

**UNIVERSITY OF CAPE TOWN**  
**SCHOOL FOR ADVANCED LEGAL STUDIES**  
**MASTERS IN SHIPPING LAW DISSERTATION**

**Student's Name:** Patrick Fitzgerald  
**Student Number:** FTZPAT004  
**Degree:** LLM specializing in the Shipping Law Programme  
**Title:** A Reconsideration of the *Prima Facie* Case  
**Course Code:** CML5616W  
**Supervisor:** Professor G B Bradfield

"Research dissertation/research paper presented for the approval of Senate in fulfillment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation/research paper. The other part of the requirement for this qualification was the completion of a programme of courses."

"I hereby declare that I have read and understood the regulations governing the submission of the degree of Master of Laws dissertations/research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/research paper conforms to those regulations."

Date 28 March 2013 Signature signature removed

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

## A RECONSIDERATION OF THE *PRIMA FACIE* CASE

### CHAPTER 1 INTRODUCTION

The topic of this dissertation is whether the requirement of ‘a *prima facie* case’ and the approach to determining whether it has been met in the context of security arrests ‘in terms of section 5(3) of the Admiralty Jurisdiction Regulation Act’<sup>1</sup> (“the Act”) is still appropriate, and if not, what should the approach and the requirements be both to security arrests and to attachments at common law and under the Act.

One of the current requirements for obtaining the relief sought in (a) ‘an application for an order for attachment to found or confirm jurisdiction’ before courts exercising their general civil jurisdiction (“attachments at common law”); (b) ‘an application for an order for attachment to found or confirm jurisdiction’ before courts exercising Admiralty jurisdiction (“attachments *in personam* under the Act”); (c) arrests *in rem* to enforce a claim in Admiralty (“arrests *in rem*”); and, (d) an application for an order for an arrest in Admiralty (“security arrests”) is that the applicant must show ‘that it has a *prima facie* case on the merits against the respondent.’<sup>2</sup>

In *The MT Tigr*,<sup>3</sup> Scott JA said the following of this requirement at common law:

‘The requirement of a *prima facie* cause of action in relation to an attachment *ad fundandam vel confirmandam jurisdictionem* at common law has been consistently held to be that an applicant need show no more than that there is evidence which, if accepted, will establish a cause of action (*Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd* 1953 (3) SA 529 (W) at 533C-D).’<sup>4</sup>

Scott JA proceeded to state that:

‘This test has been applied, not only in relation to attachments to found or confirm jurisdiction (as extended by s 4(4)(a)) at the instance of prospective plaintiffs in terms of s 3(2)(b) of the Act, but also to arrests at the instance of prospective plaintiffs in terms of s 3(5) of the Act and to so-called ‘security arrests’ in terms of s 5(3)(a).’<sup>5</sup>

<sup>1</sup> The Admiralty Jurisdiction Regulation Act 105 of 1983.

<sup>2</sup> See, for example, *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at 936E-H; *Cargo Laden On Board The MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 831G-832B; *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 579E; *MT Tigr Owners of the MT Tigr and Another v Transnet Ltd t/a Portnet (Bouygues Offshore SA and Another Intervening)* 1998 (3) 861 (SCA) at 868B-E; *Simon NO v Air Operations of Europe AB* 1999 (1) SA 217 (SCA) at 228C-E.

<sup>3</sup> *MT Tigr Owners of the MT Tigr and Another v Transnet Ltd t/a Portnet (Bouygues Offshore SA and Another Intervening)* 1998 (3) 861 (SCA).

<sup>4</sup> *The MT Tigr* at 868B-C.

<sup>5</sup> *Ibid* at 868D-E.

The 'requirement of a *prima facie* case' is thus set lower than the usual standard of proof on the applicant in civil matters to 'prove its case on a balance of probabilities.' One of the justifications for adopting this 'low threshold test' is that 'it would subvert the entire purpose of the jurisdiction if the applicant had to establish the merits of the claim at the stage of the arrest.'<sup>6</sup>

Malcolm Wallis SC accordingly said the following about this requirement in his textbook<sup>7</sup>:

'This is a relatively easy hurdle to surmount. A dispute of fact between the parties, even where the probabilities strongly favour the ship and its owners, will not suffice to prevent the applicant from discharging the burden of proof. It is accordingly rare, but not unknown, for applicants to fail to discharge this burden.'<sup>8</sup>

In each of these instances or proceedings, the current approach to determining 'whether the applicant has met the requirement of a *prima facie* case' is also the same. On the current approach adopted by our courts, it is at least incumbent on the applicant (or plaintiff) to establish 'all the allegations in his founding affidavit that will sustain a cause of action.'<sup>9</sup>

However, concerns in relation to the current approach have recently been expressed in the context of common law attachments. These concerns were raised by Hefer ADCJ in *Dabelstein and Another v Lane and Fey and others NNO*<sup>10</sup> and were referred to by Scott JA in *Hülse-Reutter and others v Gödde*.<sup>11</sup>

In *Dabelstein v Lane and Fey*<sup>12</sup> Hefer ADCJ stressed that:

'The time may come to reconsider these *dicta* for, as observed elsewhere in the passage referred to, an order of attachment *ad fundandam jurisdictionem* is an extraordinary remedy which should be applied with care and caution, and it seems to me that allegations in a respondent's opposing affidavit which the applicant cannot contradict must weigh in the assessment of the evidence.'<sup>13</sup>

These same concerns would also be relevant to attachments *in personam* under the Act.

<sup>6</sup> MJD Wallis SC *The Associated Ship & South African Admiralty Jurisdiction Siber Ink CC* Cape Town (2010) at 110-111.

<sup>7</sup> Ibid.

<sup>8</sup> Wallis op cit note at 111. See also *Dole Fresh Fruit International Ltd v MV Kapetan Leonidas* 1995 (3) SA 112 (A); *SA Marine Corporation SA v MV 'Maritime Valour' and Another*, Case No 03/2003 (Durban), SCOSA B293.

<sup>9</sup> *Dabelstein and Others v Lane and Fey NNO* 2001 (1) SA 1222 (SCA) at paragraph 7.

<sup>10</sup> Ibid paragraph 7.

<sup>11</sup> *Hülse-Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA) paras 12-14.

<sup>12</sup> *Supra* note 9.

<sup>13</sup> *Dabelstein supra* note 9 at 1227I-1228A.

For, in terms of section 3(2)(b) of the Act, ‘an action *in personam* may only be instituted against a person: “whose property within the court’s area of jurisdiction has been attached by the plaintiff or applicant, to found or confirm jurisdiction.”’<sup>14</sup> Section 4(4)(a) states further that:

‘Notwithstanding anything to the contrary in any law relating to attachment to found or confirm jurisdiction, a court in the exercise of its admiralty jurisdiction may make an order for the attachment of the property concerned although the claimant is not an *incola* either of the area of jurisdiction of that court or of the Republic.’<sup>15</sup>

In this regard, section 4(4)(a) of the Act ‘extends the scope of attachments at common law to Admiralty matters.’<sup>16</sup> Thus, Nestadt JA in *Weissglass NO v Savonnerie Establishment* stated:<sup>17</sup>

‘Parliament must therefore be taken to have intended that the relevant principles of the common law should apply to applications under this section (even though a *peregrinus* may be the applicant).’<sup>18</sup>

For this reason, if the current approach were to be reconsidered in line with Hefer ADCJ’s suggestions in the *Dabelstein v Lane and Fey*<sup>19</sup> case – the altered approach would be followed in both instances of attachments at common law and attachments *in personam* under the Act.

These concerns in relation to the current approach to attachments at common law and under the Act are also germane to security arrests.<sup>20</sup> In *The Thalassini Avgi*,<sup>21</sup> Botha JA said:

‘This approach is well established in cases of attachment of property to found jurisdiction (see eg *Butler v Banimar Shipping Co* 1978 (4) SA 753 (SE) at 757C-G and the cases cited there). In our judgment, it is the proper approach to be applied to applications for the arrest of a ship in terms of s 5(3)(a) of the Act, and we hold accordingly.’<sup>22</sup>

The Appellate Division per Botha JA in *The Thalassini Avgi*<sup>23</sup> went on to rule that:

‘This approach applies also to the question of the enforceability of the claimant’s claim in the chosen forum. If it is shown *prima facie* that the foreign Court nominated by the applicant

<sup>14</sup> The Admiralty Jurisdiction Regulation Act 105 of 1983, section 3(2)(b).

<sup>15</sup> The Admiralty Jurisdiction Regulation Act 105 of 1983, section 4(4)(a).

<sup>16</sup> *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at 937E.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid at 937E-F.

<sup>19</sup> *Supra* note 9.

<sup>20</sup> *Imperial Marine Co v Deiulemar Compagnia Di Navigazione Spa* 2012 (1) SA 58 (SCA) para 20.

<sup>21</sup> *Cargo Laden On Board The MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A).

<sup>22</sup> Ibid at 832A-B.

<sup>23</sup> *Supra* note 21.

has jurisdiction to hear the case, that would normally be the end of the enquiry into this aspect of the matter.<sup>24</sup>

It is on this basis that Wallis JA in the *Imperial Marine Co v Deilemar Compagnia Di Navigazione Spa*<sup>25</sup> also adverted to the concerns of Hefer ADCJ in *Dabelstein v Lane and Fey*.<sup>26</sup>

A security arrest, however, is a proceeding that differs fundamentally from an attachment at common law and an attachment *in personam* under the Act. The purpose of a security arrest is not to found or confirm jurisdiction<sup>27</sup> but the requirement of a *prima facie* case was adopted – whether appropriately or not – for security arrest proceedings in *The Thalassini Avgi*<sup>28</sup> case.

Moreover, there may be additional concerns on the current approach in relation to security arrests. These concerns were summed up by Wallis JA in *Imperial Marine Co (supra)* as follows:

‘A security arrest is not directed at establishing the court’s jurisdiction in future proceedings but at obtaining final relief in the form of an order that security be provided for the outcome of proceedings in another forum, usually in another jurisdiction. This is a special jurisdiction vested in our courts under the Act and in determining whether to order an arrest it is inappropriate for the court to shut its eyes to admissible and relevant evidence that is not and cannot be disputed.’<sup>29</sup>

Finally, in *Great River Shipping Inc v Sunnyface Marine Ltd*<sup>30</sup> Howie J agreed that the same approach applied by Botha JA in *The Thalassini Avgi*<sup>31</sup> to security arrests must also ‘apply to an arrest to institute an action *in rem*.’<sup>32</sup> Accordingly, Hofmeyr states that the same concerns (regarding the current approach) are now “equally germane to an action *in rem* which, like attachment, may be described as an extraordinary remedy with far-reaching consequences.”<sup>33</sup>

Nevertheless, the dual purpose of an arrest *in rem* is to give the applicant security for its claim and to obtain jurisdiction over the *res*.<sup>34</sup> Thus, if no appearance to defend is delivered on

<sup>24</sup> *Thalassini* supra note 21 at 832C.

<sup>25</sup> Supra note 20 at paragraphs 20-21.

<sup>26</sup> Supra note 9.

<sup>27</sup> See *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) at 697E-F; *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 306B-307A, 309E-F.

<sup>28</sup> Supra note 21.

<sup>29</sup> *Imperial* supra note 20 at 70A-B.

<sup>30</sup> 1994 (1) SA 65 (C).

<sup>31</sup> *Thalassini* supra note 21 at 831F-832B.

<sup>32</sup> *Great River* supra at 75.

<sup>33</sup> G Hofmeyr *Admiralty Jurisdiction: Law and Practice in South Africa* 2ed (2012) at 126.

<sup>34</sup> *Ibid* at 129.

the *res* owner's behalf, the order is obtained 'against the *res* itself' and not the owner.<sup>35</sup> This has implications both for the court's power to order security and in executing beyond the *res* itself.<sup>36</sup>

A security arrest also differs from 'an arrest *in rem*' and 'an attachment' because the value of the property arrested may be small in relation to the quantum of the claim. This is because the real intention behind a security arrest is to give the applicant 'a tangible asset against which to execute', while the property's actual value in an arrest *in rem* is of little consequence to the merits of the application and will only become important when security is given for its release.<sup>37</sup>

So, leaving aside the issue of arrests *in rem* and keeping in mind the above distinctions, the fundamental enquiry of this dissertation is whether the time has come to reconsider the approach to and 'the requirement for a *prima facie* case in the context of security arrests' in terms of section 5(3) of the Act, and, in particular, whether the concerns of the nature expressed by Hefer ADCJ in *Dabelstein v Lane* should have been considered by Botha JA in *The Thalassini Avgi*.

If so, the secondary enquiry which follows is whether the requirement of 'a *prima facie* case' and the approach to determining whether it has been met in the context of common law attachments and attachments under the Act should also be reconsidered? If so, should the requirement and approach to determining whether it has been met in each of these circumstances not rather be that adopted in proceedings for an interim interdict where factual disputes exist?

## CHAPTER 2 A *PRIMA FACIE* CASE

### 2.1 The Term "*Prima Facie* Case"

There are essentially two ways to litigate under South African civil procedure: either by instituting an action (action proceedings) or by way of an application (application proceedings).<sup>38</sup>

In action proceedings, the matter in dispute between the parties is defined by the pleadings and disputes of fact will be resolved in a trial, oral evidence will be heard and the rules of court will permit discovery to take place and the production of relevant evidence to be compelled.<sup>39</sup>

In application proceedings, the procedure is based on affidavit (i.e. a sworn statement under oath or affirmation) with no witnesses being lead nor is there a separation between a

<sup>35</sup> J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2ed Juta & Co Ltd (2009) at 92.

<sup>36</sup> Ibid at 82.

<sup>37</sup> Hofmeyr op cit note 33 at 177.

<sup>38</sup> Stephen Pete et al *Civil Procedure: A Practical Guide* 2ed Oxford University Press (2011) at 112.

<sup>39</sup> Wallis op cit note 6 at 299.

pleadings and evidence stage, as transpires in action proceedings.<sup>40</sup> Application proceedings are common where the legal issues are clearly defined and there are no material disputes of fact.<sup>41</sup>

In action proceedings, it is clear ‘that a *prima facie* case has been established’ where ‘the plaintiff has adduced evidence upon which a court applying its mind reasonably, could or might find for the plaintiff.’<sup>42</sup> This is also the question a trial court must entertain ‘when an application for absolution from the instance is brought by the defendant at the close of the plaintiff’s case.’<sup>43</sup>

The ‘test for absolution’ was first formulated in *Claude Neon Lights (SA) Ltd v Daniel*.<sup>44</sup>

The presiding officer, Miller AJA, had the following remarks to make in this regard:

‘...[W]hen absolution from the instance is sought at the close of the plaintiff’s case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T)).’<sup>45</sup>

In *Gordon Lloyd Page & Associates v Rivera*,<sup>46</sup> Harms JA said, in regard to this test, that:

‘This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G–38A; *Schmidt Bewysreg* 4<sup>th</sup> ed at 91–2).’<sup>47</sup>

In order ‘for a *prima facie* case’ to exist – the plaintiff must therefore demonstrate evidence to such a degree that a trial court would find in its favour ‘if the evidence therein were true.’<sup>48</sup>

In *Venter v Credit Guarantee Insurance Corporation of Africa Ltd*,<sup>49</sup> Grosskopf JA stated that ‘a *prima facie* case’ will call ‘for an explanation from the first appellant [in this case, the first defendant did not testify at the trial]’ and that where such explanation was lacking, a *prima facie* case would become conclusive ‘in the absence of any evidence led by or on its behalf.’<sup>50</sup>

<sup>40</sup> Pete et al op cit note 38 at 113.

<sup>41</sup> Wallis op cit note 6 at 299.

<sup>42</sup> *Mazibuko v Santam Insurance Co Ltd* 1982 (3) SA 125 (A) at 133.

<sup>43</sup> Ibid at 133.

<sup>44</sup> *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A).

<sup>45</sup> Ibid at 409G-H.

<sup>46</sup> *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA).

<sup>47</sup> Ibid at paragraph 2.

<sup>48</sup> *Lindhaven Meat Market CC v Reynecke* 2001 (1) SA 454 (W) at 456F-G.

<sup>49</sup> *Venter v Credit Guarantee Insurance Corporation of Africa Ltd* 1996 (3) SA 966 (A).

<sup>50</sup> Ibid at 980B-C.



A *prima facie* case will nevertheless be inconclusive where a defendant chooses not to testify for it is dependent in the circumstances on whether it is the correct finding for the court to make.<sup>51</sup> This begs the question whether ‘an adverse inference should then be drawn against the defendant.’ However, such a finding would depend largely upon the particular facts of the case. Nevertheless, where evidence is peculiarly within the defendant’s knowledge, our courts have ruled that ‘less evidence than otherwise would suffice to establish a *prima facie* case.’<sup>52</sup>

At this juncture, it is necessary to understand that this term is used in ‘different senses.’<sup>53</sup> This dissertation is primarily concerned with the meaning of this phrase in the context of application proceedings, particularly attachments to found or confirm jurisdiction<sup>54</sup> where the meaning of this term was first formulated by Steyn J in *Bradbury Gretorex v Standard Trading*.<sup>55</sup>

In *Ex Parte Strip Mining (Pty) Ltd*,<sup>56</sup> Plewman JA said in regard to this case and term that:

‘What was under consideration in the *Bradbury* case was the standard of proof demanded by a Court in an application for an attachment to found jurisdiction. The phrase is also used in a similar sense in, for example, applications for a temporary interdict. Proof to this standard has long been considered sufficient in our Courts in proceedings of this type which are in the nature of preliminary steps in proceedings. One reason is that in such preliminary enquiries account is taken of the possible injury which the grant or refusal of temporary relief will have on the parties respectively. However, fundamental to all these cases is the fact that such orders must necessarily be made in circumstances where no or no full investigation into the merits of the case has been made. The order then defers the full inquiry to a later stage at which the normal standards of proof are adopted. At the later stage, even in such proceedings, the ultimate determination of matters in dispute is made on the basis of facts proved in the normal way - that is on a balance of probabilities.’<sup>57</sup>

<sup>51</sup> PJ Schwikkard and S van der Merwe *Principles of Evidence* 3ed Juta & Co Ltd (2009) at 578.

<sup>52</sup> *Venter* supra note 49 at 977H-978A. See *Union Government (Minister of Railways) v Sykes* 1913 AD 165 at 173-4; *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 39G-40C; *New Zealand Construction (Pty) Ltd v Carpet Craft* 1976 (1) SA 345 (N) at 348F-H.

<sup>53</sup> *Ex Parte Strip Mining (Pty) Ltd : In re Natal Coal Exploration Co Ltd (In Liquidation) (Kangra Group Pty Ltd and Another Intervening)* 1999 (1) SA 1086 (SCA) at 1090J. See *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37H-38B.

<sup>54</sup> According to Hofmeyr at 188: “Attachment, where another ground of jurisdiction exists, is said to ‘confirm’ jurisdiction, where no other ground of jurisdiction exists, the attachment is said to ‘found’ jurisdiction.”

<sup>55</sup> *Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd* 1953 (3) SA 529 (W) at 533C-E.

<sup>56</sup> *Ex Parte Strip Mining (Pty) Ltd : In re Natal Coal Exploration Co Ltd (In Liquidation) (Kangra Group Pty Ltd and Another Intervening)* 1999 (1) SA 1086 (SCA).

<sup>57</sup> *Ibid* at 1091A-E.

It will also be concerned with the attachment and arrest of maritime property in Admiralty proceedings, which requires 'a *prima facie* case in relation to the merits of the cause of action.'<sup>58</sup>

## 2.2 The Standards of Proof

In civil cases, the general principle regarding the *onus of proof* is that an applicant (or plaintiff) must establish its 'cause of action upon a balance of probabilities.'<sup>59</sup> This standard is often described as 'proof on a balance of probabilities' and it requires the applicant to show upon a preponderance of probabilities that it is 'probable that the particular state of affairs existed.'<sup>60</sup>

It has also been held by our courts that with attachment applications 'to found (or confirm) jurisdiction,' be it at common law or under the Act,<sup>61</sup> the applicant 'bears the *onus* of proving that' the property it seeks to attach belongs to the respondent 'on a balance of probabilities.'<sup>62</sup> In *Bocimar NV v Kotor Overseas Shipping Ltd*,<sup>63</sup> Corbett CJ said that 'this same rule as to standard of proof' also applies 'to arrest applications in terms of sections 3(4), (5) and (6) of the Act' and 'to security arrests in terms of section 5(3) of the Act.'<sup>64</sup> Yet, there are exceptions to this rule.

Thus, it has been found 'that an applicant for an attachment to found or confirm jurisdiction' need only show 'they have a claim against the respondent whose property they seek to attach on a *prima facie* basis only.'<sup>65</sup> It has also been shown that the applicant for a temporary interdict needs to 'demonstrate the existence of a *prima facie* case, albeit open to some doubt.'<sup>66</sup>

Furthermore, the Appellate Division in the *MV Thalassini Avgi* adopted a less onerous standard of proof in relation to security arrests. Botha JA held 'that an applicant under section 5(3) of the Act' need only prove 'the applicant's claim and its enforceability in the nominated forum' on a *prima facie* level. This is the current approach our courts follow in security arrests.<sup>67</sup>

<sup>58</sup> Hare op cit note 35 at 88.

<sup>59</sup> *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 580I.

<sup>60</sup> Schwikkard & van der Merwe op cit note 51 at 580.

<sup>61</sup> The Admiralty Jurisdiction Regulation Act, s 3(2)(b).

<sup>62</sup> *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 581D-E. See *Lendlease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola and Others* 1976 (4) SA 464 (A) at 489B-C; *Sunnyface Marine Ltd v Hitoroy Ltd (Trans Orient Steel Ltd and Another Intervening)*; *Sunnyface Marine Ltd v Great River Shipping Inc* 1992 (2) SA 653 (C); *Rosenberg and Another v Mbanga and Others (Azaminle Liquor (Pty) Ltd Intervening)* 1992 (4) SA 331 (E) at 335E-336D.

<sup>63</sup> Supra note 59.

<sup>64</sup> Supra note 59 at 581E.

<sup>65</sup> Wallis op cit note 6 at 298.

<sup>66</sup> Ibid at 298.

<sup>67</sup> *Thalassini* supra note 21 at 831F-832B.

The main justification for adopting this standard of proof in the final instance is because a security arrest 'is not an appropriate vehicle for obtaining rulings or decisions on issues that would have to be adjudicated upon by the foreign Court hearing the main proceedings.'<sup>68</sup> In contrast to actions *in rem*, no further hearing of the matter will take place and the relief is final.<sup>69</sup>

Thus, Hare states that 'there are two distinct layers of what must be put before the court.'<sup>70</sup>

'The first layer' involves an application brought before a Judge in 'Motion Court' or Registrar of the High Court<sup>71</sup> for an arrest, attachment or security arrest order to be granted.<sup>72</sup> It is in relation to this first layer that the applicant for attachment (or arrest) bears the 'onus of satisfying the court that it is entitled to the attachment' (or arrest) 'upon the normal civil standard of a balance of probability.'<sup>73</sup> In other words, it must be established by the applicant 'that the property to be attached' (or arrested) 'belongs to the respondent on a balance of probabilities.'<sup>74</sup>

An application of this type entails asking the court 'for substantial albeit provisional relief which involves interfering significantly with the trading rights *inter alia* of the owner of the ship or other property to be detained.'<sup>75</sup> For this reason, it is 'discharged as a matter of probability.'<sup>76</sup>

Lord Denning in *Miller v Minister of Pensions*<sup>77</sup> expressed this 'first layer' as follows:

'It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it is more probable than not', the burden is discharged, but if the probabilities are equal it is not.'<sup>78</sup>

The above dictum per Lord Denning in the *Miller* case was subsequently 'approved by the Appellate Division' in *Ocean Accident and Guarantee Corporation Ltd v Koch*,<sup>79</sup> while the Supreme Court of Appeal in *Peregrine Group (Pty) Ltd v Peregrine Holdings Ltd*<sup>80</sup> recently 'held that in determining a 'likelihood' a party must prove its case on a balance of probability.'<sup>81</sup>

<sup>68</sup> *Thalassini* supra note 21 at 832C-D.

<sup>69</sup> Wallis op cit note 6 at 299.

<sup>70</sup> Hare op cit note 35 at 134.

<sup>71</sup> If the applicant for arrest is armed with a Rule 4(3) Certificate.

<sup>72</sup> Hare op cit note 35 at 134.

<sup>73</sup> Ibid at 134.

<sup>74</sup> *My Summit One: Farocean Marine (Pty) Ltd v Malacca Holdings Ltd* 2003 (6) SA 94 (C) at 100I-101B.

<sup>75</sup> Hare op cit note 35 at 134.

<sup>76</sup> Schwikkard & van der Merwe op cit note 51 at 580.

<sup>77</sup> [1947] 2 All ER 372.

<sup>78</sup> Ibid at 374.

<sup>79</sup> 1963 (4) SA 147 (A) at 157.

<sup>80</sup> 2001 (3) SA 1268 (SCA).

<sup>81</sup> Ibid para 10.

It is clear that this 'first layer of proof' is 'applied consistently irrespective of the cause of action.'<sup>82</sup> Furthermore, when assessing the normal civil standard of proof borne by the applicant on this basis, the court must not be swayed by the 'large volume of evidence' before it but should rather look to see whether the version placed in front of it by the applicant is 'probable.'<sup>83</sup>

The 'second layer of proof' pertains to the underlying merits of the applicant's claim, notwithstanding whether the applicant's 'claim is to be instituted in South Africa' or for securing proceedings taking place abroad. Hare states that 'the standard of proof in relation to the underlying merits, and to the question of whether or not a foreign court will exercise jurisdiction in relation to those merits where the South African arrest is only for security, is *prima facie*.'<sup>84</sup>

### 2.3 The Requirements for Attachments *in Personam* and Security Arrests

Both layers are more clearly illustrated when one examines the requirements for attachments and security arrests. In terms of the Rules,<sup>85</sup> an applicant for an attachment under the Act must:

- '(a) satisfy the court that the claim is a maritime claim over which the court has jurisdiction, or will have jurisdiction, once the attachment is effected;
- (b) establish a *prima facie* case in respect of such claim;<sup>86</sup>
- (c) prove on a balance of probabilities that the property to be attached is owned by the respondent;<sup>87</sup> and
- (d) must disclose whether any security or undertaking has been given to prevent the attachment, and, if so, what security or undertaking has been provided and the grounds for seeking the attachment order despite such security having been provided.'<sup>88</sup>

In *Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd*,<sup>89</sup> Nicholas AJA held that once the criteria for an attachment have been fulfilled, the applicant is entitled to

<sup>82</sup> Schwikkard & van der Merwe op cit note 51 at 580.

<sup>83</sup> Hare op cit note 35 at 135.

<sup>84</sup> *Ibid* at 135.

<sup>85</sup> See Admiralty Proceedings Rules 5(2) read with Admiralty Rule 4(3)(a) and (c).

<sup>86</sup> *Cargo Laden On Board The MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 831E-832B; *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at 938G-I; *Associated Marine Engineers (Pty) Ltd v Foraya Banki PF* 1994 (4) SA 676 (C) at 683I-685B; *MT Tigr Owners of the MT Tigr and Another v Transnet Ltd t/a Portnet (Bouygues Offshore SA and Another Intervening)* 1998 (3) 861 (SCA) at 868B-E.

<sup>87</sup> *Lendlease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola and Others* 1976 (4) SA 464 (A) at 489B-C; *The Shipping Corporation of India Ltd v Evdomon Corporation & the President of India* 1994 (1) SA 550 (A) at 556F-G; *Farocean Marine (Pty) Ltd v Malacca Holdings Ltd* 2005 (1) SA 428 (SCA) at 435G-I.

<sup>88</sup> See GB Bradfield *Law of South Africa* Vol 25(2) 2ed (2012) para 16.

<sup>89</sup> 1990 (2) SA 906 (A) at 914E-G.

its order and our court has no discretion to refuse the application.<sup>90</sup> In terms of s 7(1) of the Act, however, the Judge can exercise its discretion to decline its jurisdiction or stay the proceedings.<sup>91</sup>

In the *MV Thalassini Avgi*,<sup>92</sup> the Appellate Division laid down the requirements that an applicant must establish in order to justify a security arrest.<sup>93</sup> However, the Appellate Division was then dealing with the Act prior to the 1992 amendments, which modified section 5(3) of the Act. The current requirements are now succinctly stated in Hofmeyr's *Admiralty Jurisdiction Law and Practice in South Africa*<sup>94</sup> and were given the SCA's approval in *The Orient Stride*.<sup>95</sup>

According to Hofmeyr, a security arrest applicant must show:

- '(a) that it has a claim enforceable by an action *in personam* against the owner of the property concerned or an action *in rem* against such property;
- (b) that it has a *prima facie* case in respect of such claim which is *prima facie* enforceable in the nominated forum or forums; and
- (c) that it has a genuine and reasonable need for security in respect of the claim.'<sup>96</sup>

The Court is permitted in terms of section 5(3)(a) of the Act to:

'...order the arrest of any property for the purposes of providing security for a claim...if the person seeking the arrest has a claim enforceable by an action *in personam* against the owner of the property concerned or an action *in rem* against such property...'<sup>97</sup>

In *The Gina*,<sup>98</sup> Wallis J (as he then was) said the following of requirement (a):

'This postulates, in the case of a claim enforceable by an action *in personam*, that the party seeking the arrest has a claim against an identifiable person, and that such person is the owner of the property to be arrested. In the case of a claim enforceable by an action *in rem* it postulates that the property to be arrested is susceptible to having an action *in rem* instituted against it in respect of that claim.'<sup>99</sup>

Hofmeyr submits in regard to requirement (b) 'a *prima facie* case' that where the claim sounds in money, 'the requirement for a *prima facie* case includes the quantum of the claim.'<sup>100</sup>

<sup>90</sup> *MT Tigr* supra note 3 at 867I-J.

<sup>91</sup> See *Weissglass* supra note 16 at 939B-G. See too Bradfield op cit note 88 para 16.

<sup>92</sup> Supra note 21.

<sup>93</sup> Supra note 21 at 832I-833A.

<sup>94</sup> Hofmeyr op cit note 33 at 92.

<sup>95</sup> *MV Orient Stride: Asiatic Shipping Services Inc v Elgina Marine Co Ltd* 2009 (1) SA 246 (SCA) para 6.

<sup>96</sup> Hofmeyr op cit note 33 at 176.

<sup>97</sup> The Admiralty Jurisdiction Regulation Act 105 of 1983, section 5(3)(a).

<sup>98</sup> *MSC Gina Mediterranean Shipping Co SA v Cape Town Iron and Steel Works* 2011 (2) SA 547 (KZD) para 17.

<sup>99</sup> Ibid para 17.

<sup>100</sup> Hofmeyr op cit note 33 at 176.

The requirement in (c) 'that the applicant's need for security' be both 'genuine and reasonable' is not from the Act. It is an insertion and formulation of Didcott J in the *Katagum Wholesale Commodities Co Ltd v The Paz*,<sup>101</sup> which was subsequently endorsed per Botha JA in the *MV Thalassini Avgi* at 833A and by Corbett CJ in the *Bocimar NV* case at 579C-D.<sup>102</sup>

Requirements (a) and (c) 'must be established on a balance of probabilities.'<sup>103</sup>

Hofmeyr states, further, that a consequence of the applicant proving that the respondent owns the property concerned on a balance of probabilities is that it must also identify the property it seeks to arrest.<sup>104</sup> Thus, where 'the property sought to be arrested is' not identified by the applicant in its application nor in the arrest order, this requirement is not properly fulfilled.<sup>105</sup>

If the applicant satisfies the above requirements for a security arrest, it is then 'entitled to security for its claim.'<sup>106</sup> It is solely where the shipowner (the respondent) places countervailing evidence before the court and proves that no sound basis exists for granting the order that the application will be denied. If not, the Court has no discretion to decline the security arrest.<sup>107</sup>

In summary, Hare states the following 'in regard to the *prima facie* standard of proof:'

'The *prima facie* standard simply means that the evidence presented, despite evidence to the contrary, actual or hypothetical, would, if proven, establish a maritime claim as cause of action. And it is not for the application court at the hearing of the application for arrest or attachment (or challenge thereto) to apply the civil standard of a balance of probability to the merits of the main claim or whether the claimant's chosen forum has jurisdiction. That is the role of the trial court or other tribunal.'<sup>108</sup>

If the applicant is able to 'satisfy the different tests of both layers' then its security arrest or attachment application will be granted (or upheld if it becomes challenged by the shipowner).<sup>109</sup>

## 2.4 The Practice of an Arrest or Attachment and Procedure for Setting-Aside

<sup>101</sup> *The MV Paz* 1984 (3) SA 261 (N) at 270A.

<sup>102</sup> The Court in *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 583E-F held further that the applicant has to establish 'that it has a genuine and reasonable need for security on a balance of probabilities.'

<sup>103</sup> Hofmeyr op cit note 33 at 176.

<sup>104</sup> Ibid at 176.

<sup>105</sup> *MSC Gina* supra note 98 para 17.

<sup>106</sup> *Thalassini* supra note 21 at 833B-C. See too Bradfield op cit note 88 para 18.

<sup>107</sup> Ibid at 833B-C. Botha JA states at 833B-C that: 'The postulate of an unfettered discretion would, in our view, run counter to the intention of the Legislature.'

<sup>108</sup> Hare op cit note 35 at 136.

<sup>109</sup> Ibid at 136.

In *The Thalassini Avgi* (*supra*), Botha JA sets out the steps that an applicant will take in practice to obtain an order ‘in terms of section 5(3)’ to the steps of the shipowner to procure the release of its vessel from arrest. In making these remarks, Botha JA also proceeds to comment on some facets of the procedure which the shipowner will follow thereafter to set-aside the arrest. These comments refer to ‘the incidence of the onus’ and the statements made in *Bradbury Gretorex*,<sup>110</sup> which are linked to the common-law principles for setting-aside attachments brought *ex parte*.<sup>111</sup>

The Judge of Appeal states that an order for a security arrest will usually be obtained *ex parte* in practice. The vessel is then under arrest and the shipowner will set about trying to procure the vessel’s release from arrest, which is usually achieved by the owner putting up security for the claim in place of the ship. If an agreement is reached ‘between the parties on the quantum and form of security,’ no further matters will need to be determined. However, if no agreement can be reached on these facets – the court order will normally cater for the ship’s release from arrest upon a satisfactory amount of security being furnished to the Registrar.<sup>112</sup>

In any event, the owner of the ship will still be allowed to bring a court application<sup>113</sup> for an order releasing the vessel from arrest once a satisfactory amount of security is furnished.<sup>114</sup>

Alternatively, the shipowner may obtain the vessel’s release from arrest by applying to court for an order that the arrest order itself ‘be set-aside.’ In terms of section 5(2)(c) of the Act, the court may also insert a condition in the order, as has become ‘salutary practice’ under section 5(3)(a). However, even where no condition is inserted, Botha JA states that the vessel owner would still be permitted to approach the court for an order to set aside the original arrest order.<sup>115</sup>

The Judge of Appeal states that:

‘Although the Act does not expressly empower the Court to set aside such an order, there can be no doubt that in fact it has the power to do so in accordance with the common law principles relating to the setting aside of attachment orders obtained *ex parte*.’<sup>116</sup>

Botha JA next deals with ‘the incidence of the onus of proof’ in this type of application.

<sup>110</sup> *Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd* 1953 (3) SA 529 (W) at 531A-D.

<sup>111</sup> *Thalassini* *supra* note 21 at 833G-834D.

<sup>112</sup> *Ibid* at 833G-H.

<sup>113</sup> *Supra* note 21, Botha JA states at 833I-J that: ‘In such an application the Court will be concerned with the question whether the security tendered is proper and adequate.’

<sup>114</sup> *Thalassini* *supra* note 21 at 833I. The Court has this power to order the furnishing of security in exchange for the release of the vessel in terms of sections 5(3)(c) and 5(2)(b) and (c) of the Act.

<sup>115</sup> *Ibid* at 834A-C.

<sup>116</sup> *Thalassini* *supra* note 21 at 834C.

The Judge of Appeal refers to the statements of Steyn J in *Bradbury Gretorex* at 531A-D<sup>117</sup> and states that ‘this approach was correctly applied in the case of applications to set-aside arrests in terms of s 3(4) and s 3(5) of the Act’ in the *Transgroup Shipping*<sup>118</sup> and *MV Andrico Unity*<sup>119</sup> cases. Accordingly, this approach must also apply to security arrests that are obtained *ex parte*.<sup>120</sup>

In relation to the *MV Andrico Unity*<sup>121</sup> case, Botha JA makes reference to Marais J’s finding therein (at 799H) where it was held ‘that in an application for the setting aside of an order of arrest the party who obtained the order may advance any ground to justify the arrest irrespective of whether or not he relied upon it initially in obtaining the order.’<sup>122</sup> In the Appellate Division’s view, this finding, reasoning and authority of Marais J<sup>123</sup> is correct and it was accordingly held that it will also apply to orders made ‘under section 5(3) of the Act.’<sup>124</sup>

Botha JA makes one further observation regarding ‘the application to set aside the arrest.’ This is that while the arresting party will be burdened with the same onus to justify the arrest (as it would have borne if the initial application had been defended by the vessel owner on receiving notice) – the vessel owner, in the same vein, bears the ‘onus of proving any countervailing circumstances which he could have raised and proved in answer to the original application.’<sup>125</sup>

The Judge of Appeal therefore states that:

‘While the claimant must still show that he has a *prima facie* cause of action, *prima facie* enforceable in the foreign Court of his choice in the sense explained earlier, the shipowner, if he alleges that the foreign Court would as a matter of fact decline to exercise its jurisdiction to adjudicate upon the matter, or that the foreign court would not afford him a just and fair hearing, is still required to discharge the *onus* of proof in that regard.’<sup>126</sup>

The *Weissglass* case (*supra*) sets out the procedure in ‘an application to set-aside an attachment.’ In a setting-aside application, the respondent similarly bears the onus of proving

<sup>117</sup> *Supra* note 110.

<sup>118</sup> *Transgroup Shipping SA (Pty) Ltd v Owners of MV Kyoju Maru* 1984 (4) SA 210 (D) at 214I.

<sup>119</sup> *Transol Bunker BV v MV Andrico Unity and Others* 1987 (3) SA 794 (C) at 799D.

<sup>120</sup> *Thalassini supra* note 21 at 834D-F. This passage was applied with approval per Nestadt JA in the AD case of *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at page 936G-H.

<sup>121</sup> *Transol Bunker supra* note 119.

<sup>122</sup> *Thalassini supra* note 21 at 834F.

<sup>123</sup> *Transol Bunker supra* note 119 at 799A-800D.

<sup>124</sup> *Thalassini supra* note 21 at 834F-G. This passage was applied with approval per Nestadt JA in the AD case of *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at page 936H-I.

<sup>125</sup> *Thalassini supra* note 21 at 834G-H.

<sup>126</sup> *Thalassini supra* note 21 at 834H-I.



that the attachment order should stand.<sup>127</sup> Nestadt JA refers to the dicta of Steyn J in *Bradbury Gretorex*<sup>128</sup> and the *MV Thalassini Avgi*<sup>129</sup> in stating that ‘the principle is that a party cannot by obtaining *ex parte* an order in his favour secure a more advantageous position than he would have been in if the other party had, consequent upon notice, had an opportunity of opposing.’<sup>130</sup>

The Judge of Appeal states further that, in seeking to prove ‘a *prima facie* case on the merits,’<sup>131</sup> the respondent is not confined to averments in its attachment application but can rely on the allegations in ‘its answering affidavit filed in the application to set-aside the order.’<sup>132</sup>

### CHAPTER 3 BRADBURY GRETOREX & THE *PRIMA FACIE* CASE REQUIREMENT

In relation to the requirement for ‘a *prima facie* case,’ Hare states that:

‘The test remains whether the arrestor has put before the court, either in the summons and the arrest application or later in the application to set the arrest aside, evidence which, if accepted, would show that the claimant has a cause of action as averred in the summons *in rem*. This is the *prima facie* test in relation to the underlying substantial merits, regardless of whether or not the probabilities are against the claimant.’<sup>133</sup>

The ‘test for a *prima facie* case’ was set early on by Steyn J in *Bradbury Gretorex Co. (Colonial) Ltd v Standard Trading Co. Pty Ltd*.<sup>134</sup> The central issue for determination was the ‘degree of proof of a cause of action’ that an *incola* applicant should establish ‘in an application for attachment to found (or confirm) jurisdiction’ at common law.<sup>135</sup> An application had been brought by Standard Trading Company Limited to attach the property of Bradbury Gretorex Company Limited (“Bradbury Gretorex”) as the company was a *peregrinus* of the court i.e. the company was domiciled and resident in a foreign country. Bradbury Gretorex had no local office or place of business in the Union but did have certain printed spun materials in the possession of its local agents in Johannesburg. Thus, Standard Trading brought an application to attach Bradbury Gretorex’s goods with the intention of founding jurisdiction in an action for the

<sup>127</sup> Hofmeyr op cit note 33 at 200.

<sup>128</sup> *Bradbury Gretorex* supra note 110 at 531B-C.

<sup>129</sup> *Thalassini* supra note 21 at 831H-I.

<sup>130</sup> *Weissglass* supra note 16 at 936F-G.

<sup>131</sup> *Ibid.* Nestadt JA refers here to the ‘*prima facie* case requirement’ applied in *The MV Thalassini Avgi* at 831H-I.

<sup>132</sup> *Ibid* at 936G-I. Here, Nestadt JA refers to the dicta of Marais J in *MV Andrico Unity* and approved in *The MV Thalassini Avgi* at 834F-G.

<sup>133</sup> Hare op cit note 35 at 88.

<sup>134</sup> Supra note 110.

<sup>135</sup> *Bradbury* supra note 110 at 531F-G. The term ‘*incola*’ refers to a person domiciled and resident in South Africa.

recovery of money paid to Bradbury Gretorex under a contract of sale and for damages arising from Bradbury Gretorex's breach thereof. The WLD granted the order on 22 January 1952.<sup>136</sup>

In response, Bradbury Gretorex brought an application to set-aside the attachment. In doing so, the company denied any contractual relationship with Standard Trading, that it had perpetrated a breach of contract and that the goods under attachment were its property.<sup>137</sup> Nevertheless, it was not disputed between the parties that it was for Standard Trading to prove in these proceedings (as it had to do in the original application) that it had 'a *prima facie* cause of action against Bradbury Gretorex' and that the goods attached belonged to Bradbury Gretorex.<sup>138</sup>

In support of this statement of the law, Judge Steyn refers to the case authority of *Anderson and Coltman Ltd v Universal Trading Co*,<sup>139</sup> where it was pointed out by Judge Clayden that:

'[T]he respondent, in a case such as this, cannot merely by obtaining *ex parte* an order in its favour secure a more advantageous position than it would have had if the applicant had had an opportunity of putting counter allegations before the Court.'<sup>140</sup>

Judge Steyn states further that support for this is to be found in Peckius's *Handopleggen*,<sup>141</sup> where the jurist explains, in relation to such proceedings, that 'the respondent is to be regarded as the plaintiff, who has to discharge the *onus* of proof, and the applicant as the defendant.'<sup>142</sup>

It was also not in dispute that Standard Trading was required to prove Bradbury Gretorex's ownership of the goods on the normal standard of 'proof by a balance of probabilities.'<sup>143</sup> Counsel for Bradbury Gretorex, nevertheless, submitted that 'it is not sufficient for the respondent to bring evidence which, if accepted, will show a cause of action, but that at least the measure of proof indicated in *Webster v Mitchell*, 1948 (1) S.A. 1186 (W), is required.'<sup>144</sup>

In reply to this submission, Steyn J distinguishes the facts of *Bradbury Gretorex* to that in *Webster v Mitchell*.<sup>145</sup> The learned Judge points out that the latter case had to do with an application for a temporary interdict in circumstances where 'the court was, in relation to the right asserted, concerned more particularly with the meaning of the phrase "though *prima facie*

<sup>136</sup> *Bradbury Gretorex* supra note 110 at 530D-E.

<sup>137</sup> *Ibid* at 530G-H.

<sup>138</sup> *Ibid* at 531A-B.

<sup>139</sup> 1948 (1) SA 1277 (W) at 1284.

<sup>140</sup> *Bradbury Gretorex* supra note 110 at 531B-C.

<sup>141</sup> At chapter 36.

<sup>142</sup> *Bradbury Gretorex* supra note 110 at 531C.

<sup>143</sup> *Ibid* at 531D.

<sup>144</sup> *Bradbury Gretorex* supra note 110 at 531D-E.

<sup>145</sup> *Webster v Mitchell* 1948 (1) SA 1186 (W).

established, is open to some doubt,” which occurs in the judgment of Innes JA in *Setlogelo v Setlogelo*, 1914 A.D. 221 at p.227.<sup>146</sup> Judge Steyn does not believe the Court should be guided by this phrase in determining the degree of proof to be presented in an application of this type.<sup>147</sup>

Steyn J reasons that considerations between temporary interdicts and attachments differ.<sup>148</sup> The Judge points out that the former interfere with an ‘apparent right’ and regard must therefore be had to the ‘possible injury to either side’ in applications of this type. Steyn J cites this factor as being the reason for requiring a higher degree of proof in temporary interdict applications.<sup>149</sup>

In relation to attachments, Judge Steyn recognizes that attachments also interfere with ‘the right in the property attached’ but views attachments as forcing ‘a *peregrinus* to submit to the jurisdiction of a Court which would otherwise have no jurisdiction, and there is also a balance of disadvantage as between the *incola* and the *peregrinus* which might be invoked.’ This explains the ‘similarity of reason’ in favor of both classes of cases having this related degree of proof.<sup>150</sup>

The Judge nevertheless recognizes that there are also further considerations between them:

‘The first is that it is the attachment which establishes jurisdiction, quite apart from the cause of action or any other *ratio competentiae* (*Lecomte v W. and B. Syndicate of Madagascar*, 1905 T.S. 696 at p.698; H.D.J. Bodenstein, “Arrest to Found Jurisdiction”, *S.A. Law Journal*, vol. 34, p.193; *Halse v Warwick*, 1931 C.P.D. 233). The matter of primary concern, therefore, is the attachment, and not the cause of action. In fact, the Court is not entitled to go into the merits of the case (*Lecomte's* case at p. 704; *Lippert v de Marillac*, 11 S.C. 312 at p. 316), as it would have to do in the ordinary course if it were to be called upon to determine, according to the standard of proof suggested, whether or not the party claiming the attachment has *prima facie* established a cause of action.’<sup>151</sup>

Steyn J believes further that the purpose behind this procedure should not be forgotten.<sup>152</sup>

The learned Judge states that its purpose ‘appears to be to enable an *incola* to pursue his claim against a *peregrinus* as if the *peregrinus* were otherwise subject to the jurisdiction of the

<sup>146</sup> *Bradbury Gretorex* supra note 110 at 531E-F.

<sup>147</sup> *Ibid* at 531F-G.

<sup>148</sup> *Ibid* at 531G.

<sup>149</sup> *Ibid* at 531G-H.

<sup>150</sup> *Ibid* at 531H.

<sup>151</sup> *Bradbury Gretorex* supra note 110 at 531H-532A.

<sup>152</sup> *Ibid* at 532B.

Court.<sup>153</sup> Steyn J cites *Springle v Mercantile Association of Swaziland*<sup>154</sup> as case authority and further quotes Peckius<sup>155</sup> in support of this purpose behind the procedure for attachment.<sup>156</sup>

Judge Steyn also cites Peckius and Vromans<sup>157</sup> to show that the reason for an attachment is 'well known,' being to 'avoid the costs and inconvenience which would otherwise have to be incurred by an *incola* in following the debtor to his own Court.' Steyn J finds that 'the remedy, therefore, however exceptional, is one intended primarily for the benefit of the *incola*.'<sup>158</sup>

The Jurists Sande<sup>159</sup>, Huber<sup>160</sup> and Voet<sup>161</sup> are all referred to in order to emphasise why the procedure of attachment is used by an *incola* when proceeding against a foreign *peregrinus*.<sup>162</sup>

Judge Steyn proceeds to state that if this is its purpose i.e. 'to enable the *incola*, primarily or solely for his own benefit, to sue his debtor as if he were domiciled within the jurisdiction,' then you would not expect to find 'any special obstacle', being 'in the form of a degree of proof of his cause of action', placed in the *incola*'s way which the *incola* 'would not encounter in any form where the debtor is domiciled within the jurisdiction.'<sup>163</sup> Thus, Judge Steyn decides that:

'To require a degree of proof of the cause of action which might prevent an *incola* from proceeding against a *peregrinus* in a case in which he would have been able to do so, had the *peregrinus* been within the jurisdiction, would be out of keeping with the purpose of and reason for the procedure by way of attachment. That does not mean that the *peregrinus* is to be exposed to groundless or frivolous actions. Where an action is quite clearly of that nature, an order for attachment will be refused, as was done in the cases of *Lecomte* and *Lippert*.'<sup>164</sup>

After considering relevant passages from the *Lecomte*<sup>165</sup> and *Lippert* cases,<sup>166</sup> Steyn J refers to another quote of Peckius<sup>167</sup> and in light of the above reasons comes to find that these authorities 'justify the conclusion' that: 'the requirement of a *prima facie* cause of action, in

<sup>153</sup> Ibid at 532B.

<sup>154</sup> 1904 T.S. 163 at 166.

<sup>155</sup> Peckius, *Handopleggen* (supra).

<sup>156</sup> *Bradbury Gretorex* supra note 110 at 532B-D.

<sup>157</sup> Vromans, *De Foro Competenti* 1, 15 n. 34.

<sup>158</sup> *Bradbury Gretorex* supra note 110 at 532D-E.

<sup>159</sup> According to Sande, *Decisiones* 1.17.3, an attachment is resorted to: '*ob solam commoditatem conveniendi*.'

<sup>160</sup> Huber, *Hedendaegse Rechtgeleertheit*, 4.31.3, states: 'alleenlyk om het gemak en profyt van die crediteur, op dat die niet gehouden soude zyn den schuldenaer verre to moeten nae loopen.'

<sup>161</sup> Voet 2.4.22;5.1.66.

<sup>162</sup> *Bradbury Gretorex* supra note 110 at 532E-F.

<sup>163</sup> Ibid at 532F-G.

<sup>164</sup> *Bradbury Gretorex* supra note 110 at 532G-H.

<sup>165</sup> See *Lecomte v W. and B. Syndicate of Madagascar*, 1905 T.S. 696 at 704

<sup>166</sup> *Lippert v de Marillac*, 11 S.C. 312 at 316.

<sup>167</sup> Peckius, *Handopleggen*, Ch. 45, 20.

relation to an attachment to found jurisdiction, is satisfied where there is evidence which, if accepted, will show a cause of action.<sup>168</sup> Judge Steyn clarifies this conclusion by stating that:

‘The mere fact that such evidence is contradicted would not disentitle the applicant to the remedy. Even where the probabilities are against him, the requirement would still be satisfied. It is only where it is quite clear that he has no action, or cannot succeed, that an attachment should be refused or discharged on the ground here in question.’<sup>169</sup>

Finally, Judge Steyn distinguishes the statement of De Villiers CJ in the *Lippert*<sup>170</sup> case where the (then) Chief Justice said that ‘there should be some *prima facie* reason for believing that the suit will be successful’, which ‘seems to require a higher degree of proof.’<sup>171</sup> Steyn J mentions that there may be some support for this view in Peckius<sup>172</sup> and also Vromans<sup>173</sup> but ultimately finds that these legal jurists did not always distinguish properly between ‘arrests of *peregrini*’, ‘attachments of their property to found jurisdiction’ and ‘other arrests, such as that of a person *suspectus de fuga*.’ Moreover, Steyn J points out that these passages were dealing with the third category of cases above, which both jurists regarded with disfavor and controversy.<sup>174</sup>

In relation to both passages of Peckius and Vromans, Judge Steyn concludes that:

‘Neither of them state that in practice such a measure of proof was in their time in fact required. I do not think, therefore, that they could be cited in support of the statement in *Lippert's* case. If that statement does mean that a higher standard of proof is necessary, then in my respectful opinion, for the reasons already indicated, it goes too far.’<sup>175</sup>

In summary, the significance of *Bradbury Gretorex* is that it formulates the ‘test’ in regard to the requirement for ‘a *prima facie* case in’ the context of ‘attachments to found (or confirm) jurisdiction’ at common law. The case also establishes the ‘degree of proof or evidence’ that will suffice to obtain ‘an order for the attachment of property.’<sup>176</sup> The wider significance is that it is this ‘*prima facie* case’ requirement which has been adopted and approved by the Supreme Court of Appeal in the context of attachments at common law and under the Act and security arrests.<sup>177</sup>

<sup>168</sup> *Bradbury Gretorex* at 533C-D.

<sup>169</sup> *Ibid* at 533D-E.

<sup>170</sup> *Lippert v de Marillac*, 11 S.C. 312 at 316.

<sup>171</sup> *Bradbury Gretorex* supra note 110 at 533E-F.

<sup>172</sup> Peckius, *Handopleggen*, Ch. 16, 4.

<sup>173</sup> Vromans, *De Foro Competenti*, 1, 25 n. 47.

<sup>174</sup> *Bradbury Gretorex* supra note 110 at 533F-534A.

<sup>175</sup> *Ibid* at 534A.

<sup>176</sup> *Bradbury Gretorex* supra note 110 at 529C.

<sup>177</sup> See *Thalassini* supra note 21.

#### CHAPTER 4 BRADBURY GRETOREX AND COMMON LAW ATTACHMENTS

Yet, this formulation of the '*prima facie* case' was not at first followed in *Cochran v Miller*.<sup>178</sup> This case dealt with an application 'for the arrest of' Cochran 'to found jurisdiction in an action' instituted by Miller for the payment of damages resulting from Cochran's committal of adultery with Miller's wife. The order was duly granted by Judge Caney on 14 August 1964. Cochran then brought an application to set the arrest aside and sought a refund of the security lodged.<sup>179</sup>

The issue that arose for determination before Henning J was the 'degree of proof' borne by Miller as the respondent. Cochran's counsel suggested that the degree of proof required was akin to 'the requirement for a *prima facie* case in the case of an application for a temporary interdict' but the opposing counsel submitted that the quantum of proof in these circumstances was less.<sup>180</sup>

Judge Henning makes reference to Steyn J's detailed consideration of this question in *Bradbury Gretorex*,<sup>181</sup> but suggests that the degree of proof on the applicant is somewhat more.<sup>182</sup> In Henning J's view, there is a higher burden of proof on the applicant in an application of this type and the last sentence of Judge Steyn's statement (at page 533D) emphasizes that if the applicant has 'no cause of action,' the applicant has not managed to discharge its onus of proof.<sup>183</sup> According to Judge Henning, the 'proper test' in these circumstances should rather be:

'[W]hether an applicant has produced evidence which, if believed, might persuade a reasonable man to draw the inference that the wrong complained of has been committed. The Court is not confined to the statement put up by an applicant and must have regard, in my opinion, to such information as is properly placed before it by the respondent. It is true that a mere denial by respondent of material allegations made by the applicant could hardly in the normal course detract from the value of the applicant's allegations. On the other hand, where allegations of a material nature made by an applicant are admitted but are explained in an apparently satisfactory way by the respondent, I consider that such an explanation should be given due weight and cannot be ignored.'<sup>184</sup>

<sup>178</sup> *Cochran v Miller* 1965 (1) SA 162 (D).

<sup>179</sup> *Ibid* at 162D-F.

<sup>180</sup> *Ibid* at 162H-163A.

<sup>181</sup> *Bradbury Gretorex* *supra* note 110 at 533D.

<sup>182</sup> *Cochran v Miller* *supra* note 178 at 163B.

<sup>183</sup> *Ibid* at 163B.

<sup>184</sup> *Cochran* *supra* note 178 at 163C-E.

This formulation of the test by Henning J, however did not find favour or support with the ‘full bench of the Transvaal Provincial Division in’ *Tick v Broude and Another*.<sup>185</sup> The *Tick* case involved an application to set-aside ‘an order for the arrest of a person to found jurisdiction.’<sup>186</sup> In the main judgment of Galgut J and concurred with by Cillie JP and Ludorf J, the full-bench instead approved the test for a *prima facie* case<sup>187</sup> laid down by Steyn J in *Bradbury Gretorex*.<sup>188</sup>

The next case that followed was *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd*.<sup>189</sup> Here, the respondent (“Nissho”) was granted an order for the attachment of a tug belonging to the applicant (“Yorigami”) ‘for the purposes of founding or confirming jurisdiction in an action for damages’ against Yorigami arising from the wreck of Nissho’s two vessels along the coast between Camps Bay and Llandudno. Yorigami applied to set the attachment aside.<sup>190</sup>

In the course of his judgment, Judge Friedman said ‘that the onus of proof on the applicant’ in ‘an application for attachment to found or confirm jurisdiction is not a very heavy one.’<sup>191</sup> The Cape Provincial Division Judge proceeded to state that the degree of proof is to be satisfied according ‘to the requirement for a *prima facie* case in’ *Bradbury Gretorex*<sup>192</sup> and also referred to Steyn J’s statement therein (at p533) where it was said ‘it is only where it is quite clear that he has no action, or cannot succeed, that an attachment should be refused or discharged....’<sup>193</sup>

The *Italtrafo SpA v Electricity Supply Commission*<sup>194</sup> is a further case dealing with an attachment to found jurisdiction and what the applicant must satisfy for an order of attachment.

In this instance, the Electricity Supply Commission (hereinafter “the ESC”) obtained an order for an attachment to found jurisdiction of all Italtrafo’s ‘right, title and interest in its claim against the ESC’ on account of Italtrafo’s supply and erection of a transformer at the insistence and request of the ESC.<sup>195</sup> The purpose of attachment was to permit the ESC to bring its ‘action for payment of the damages’ and costs against Italtrafo in the Witwatersrand Local Division.<sup>196</sup>

<sup>185</sup> *Tick v Broude and Another* 1973 (1) SA 462 (T).

<sup>186</sup> *Ibid* at 464A-D.

<sup>187</sup> In relation to an application for attachment to found jurisdiction.

<sup>188</sup> *Tick* supra note 185 at 467E-F.

<sup>189</sup> *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C).

<sup>190</sup> *Ibid* at 685E-H.

<sup>191</sup> *Ibid* at 687.

<sup>192</sup> *Bradbury* supra note 110.

<sup>193</sup> *Yorigami* supra note 189 at 687H-688A.

<sup>194</sup> *Italtrafo SpA v Electricity Supply Commission* 1978 (2) SA 705 (W).

<sup>195</sup> *Italtrafo SpA* supra note 194 at 706A.

<sup>196</sup> *Ibid* at 706A-707C.

An application was then launched by Italtrafo to have the order and attachment set-aside.<sup>197</sup>

The *Italtrafo* case is instructive for its reiterations of the law regarding attachments to found (or confirm) jurisdiction at common law. The first point is that ‘an *incola* applicant...must establish a *prima facie* case against the *peregrinus*’ and also show ‘on a balance of probabilities that the goods to be attached are the property of that *peregrinus*.’ King AJ reminds us that the remedy for attachment is ‘an exceptional one’ but if these requirements are met, the *incola* applicant is entitled to an order to this effect. Furthermore, the Judge points out that the procedure for attachment is ‘intended primarily for’ the *incola*’s benefit and a ‘court is not to enter into the merits of the case’ based on the authority of the *Lecomte*<sup>198</sup> and *Lippert*<sup>199</sup> cases. Finally, the King AJ re-emphasizes that when the *incola* applicant institutes its attachment application, it ‘is the attachment itself and not the cause of action that is the matter in issue.’<sup>200</sup>

The second point is that ‘a *prima facie* case in regard to the cause of action’ is not akin to ‘a *prima facie* case’ in the context in which that term is used in applications for an interim interdict. Moreover, King AJ points out that ‘the test as to whether a *prima facie* case has been established’ is also different to that established in the case of *Webster v Mitchell*.<sup>201</sup> Rather, King AJ states that the current test is in fact that laid down in *Bradbury Gretorex*<sup>202</sup> and that this test was ‘by implication approved of by the [TPD] Full Bench’ in *Tick v Broude and Another*.<sup>203204</sup>

The third point is that King AJ favours to the test laid down in *Bradbury Gretorex* as opposed to Henning J’s formulation in *Cochran v Miller*.<sup>205</sup> In reference to the test in *Cochran*, King AJ says that ‘it was suggested in argument that this was a gloss on the test laid down in the *Bradbury Gretorex* case, but I do not have to consider this, having regard to *Tick*’s case *supra* and the fact that the *Bradbury Gretorex* case has been consistently followed in the Transvaal.’<sup>206</sup>

In summary, the significance of these cases is that they endorse Steyn J’s formulation in *Bradbury Gretorex* as the test for attachments ‘to found or confirm jurisdiction at common law.’

<sup>197</sup> Ibid at 707C.

<sup>198</sup> *Lecomte* supra note 165 at 704.

<sup>199</sup> *Lippert* supra note 166 at 316.

<sup>200</sup> *Italtrafo* supra note 194 at 708H-709C.

<sup>201</sup> *Webster* supra note 145.

<sup>202</sup> *Bradbury Gretorex* supra note 110 at 533C-E.

<sup>203</sup> *Tick* supra note 185 at 467E-F.

<sup>204</sup> *Italtrafo* supra note 194 at 709C-E.

<sup>205</sup> *Cochran* supra note 178 at 163.

<sup>206</sup> *Italtrafo* supra note 194 at 709E-F.



Further endorsement of this requirement ‘for a *prima facie* case in the context of’ common law attachments to found jurisdiction can also be found in *Butler v Banimar Shipping Company*.<sup>207</sup> Howie AJ (as he then was) refers to the applicant’s onus to prove its case on a *prima facie* basis and cites *Bradbury Gretorex*,<sup>208</sup> *Yorigami*<sup>209</sup> and *Italtrafo*<sup>210</sup> as the authority.<sup>211</sup> The Acting Judge relies on these cases to illustrate that ‘the term *prima facie* as applied to this sort of case bears a meaning different from that which it is commonly known in other contexts.’ The (then) Acting Judge explains that the term used in this context rather means that an applicant should tender ‘evidence which, if accepted, will establish a cause of action’ and that where such evidence is in dispute – it ‘will not disentitle the applicant’ from obtaining the desired order.<sup>212</sup>

Acting Judge Howie states further, in relation to the test set out in *Cochran v Miller*, that:

‘I am aware that in *Cochran v Miller* 1965 (1) SA 162 (D) at 163 it was suggested that the task of an applicant was somewhat greater but this point was not argued before me and I, in any event, with respect, prefer the test laid down in the three cases cited above, especially as that test has been followed in the Full Bench decision of the Transvaal Provincial Division in *Tick v Broude and Another* 1973 (1) SA 462 (T) at 467E.’<sup>213</sup>

In addition, it is reiterated that the merits of the cause of action must not be entered into.<sup>214</sup>

Finally, the Supreme Court of Appeal gave its approval to Judge Steyn’s dicta in *Bradbury Gretorex* at 531H-532A and 533C-D and first applied it in *Hülse-Reutter and Others v Gödde*.<sup>215</sup>

In a matter dealing with an attachment to ‘confirm the jurisdiction of the court in an action’ instituted by Gödde against two German citizens as *peregrini* defendants,<sup>216</sup> Scott JA ruled that:

‘The requirement of a *prima facie* case in relation to attachments to found or confirm jurisdiction has over the years been said to be satisfied if an applicant shows that there is evidence which, if accepted, will establish a cause of action and that the mere fact that such evidence is contradicted will not disentitle the applicant to relief – not even if the probabilities are against him; it is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused. This formulation of the test by

<sup>207</sup> *Butler v Banimar Shipping Company* 1978 (4) SA 753 (SE) at 757.

<sup>208</sup> *Bradbury Gretorex* supra note 110 at 533C-E.

<sup>209</sup> *Yorigami* supra note 189 at 687.

<sup>210</sup> *Italtrafo* supra note 194 at 709A.

<sup>211</sup> *Butler* supra note 207 at 757C-D.

<sup>212</sup> *Ibid* at 757D-E.

<sup>213</sup> *Ibid* at 757E-F.

<sup>214</sup> *Ibid* at 757G. See the *Italtrafo* case supra at 709B-C and the cases cited therein.

<sup>215</sup> *Hülse-Reutter* supra note 11 para 12.

<sup>216</sup> *Ibid* para 1.

Steyn J in *Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd* 1953 (3) SA 529 (W) at 533C-D has been applied both by this Court and the Provincial Divisions.<sup>217</sup>

## CHAPTER 5 *BRADBURY GRETOREX AND THE MV THALASSINI AVGI*

In Admiralty proceedings, the general approach has been to follow the formulation of Steyn J in *Bradbury Gretorex*.<sup>218</sup> However, this approach did not initially find favour 'in the realm of security arrests.' In *Katagum Wholesale Commodities v The Paz*,<sup>219</sup> the 'full bench of the Natal Provincial Division' took the position that 'the applicant should make averments that will satisfy the Court *prima facie* that he has reasonable prospects of success in the main proceedings.'<sup>220</sup>

*The MV Paz* dealt with an application to arrest 'a ship in terms of section 5(3) of the Act ("security arrest").' The Act was brought into effect '1 November 1983' and contained a number of 'far-reaching and novel provisions,' such as the security arrest procedure. In short, 'section 5(3) of the Act permitted our Courts 'to grant the arrest of' a foreign-owned ship at the instance of a foreigner in order to obtain 'security for a claim pending in' another jurisdiction, which claim 'is based on a foreign cause of action and subject to the law of that' foreign jurisdiction.'<sup>221</sup>

Judge Friedman and Didcott J wrote the judgments of the court. Both judgments set out the policy that should govern the Court in entertaining security arrest applications and the circumstances in which the Court should generally attempt to exercise these statutory powers.<sup>222</sup>

In addition to stating which averments the applicant should make, Judge Friedman ruled that 'in an application to obtain security for a claim sounding in money,' the applicant 'must at least allege and explain: (a) why he needs security; (b) that he has not already obtained security; and (c) that he cannot obtain such security in the other contemplated or pending arbitration or proceedings.' Friedman J made these remarks after 'it was accepted by the applicant's counsel that it' is incumbent on the applicant to state why he needs the court's assistance in South Africa in circumstances where the main proceedings are pending elsewhere in another jurisdiction.<sup>223</sup>

In the judgment of Didcott J, which agreed with the above statements of Judge Friedman, it was further stated that 'such circumstances include those which the Court has to know in order to

<sup>217</sup> *Hülse-Reutter* supra note 11 at 1343E-F.

<sup>218</sup> *Bradbury Gretorex* supra note 110 at 533D-E.

<sup>219</sup> *The MV Paz* supra note 101.

<sup>220</sup> *Ibid* at 268A.

<sup>221</sup> *Ibid* at 263B-E.

<sup>222</sup> *Ibid* at 263A-B.

<sup>223</sup> *The MV Paz* supra note 101 at 262E-F; 267I-268E.

come to a conclusion about the applicant's *prima facie* prospects of success in the main proceedings, as well as all which explain why he now needs the security he seeks, why he does not yet have enough and cannot get it elsewhere less drastically or more conveniently.<sup>224</sup>

In short, the significance of this case is that it ignored the test in *Bradbury Gretorex*<sup>225</sup> and instead adopted a different requirement and approach to security arrests in Admiralty litigation.

The Appellate Division, nevertheless, decided against this approach in *The MV Thalassini Avgi*.<sup>226</sup> On Appeal, Judge Botha held that 'the test' in the context of security arrests should rather be akin to the requirement of 'a *prima facie* case and the approach to determining whether it has been met' as applied in attachments 'to found (or confirm) jurisdiction at common law.'<sup>227</sup>

In admiralty practice, *The MV Thalassini Avgi* case is instructive for the general comments it makes 'regarding the application of section 5(3) of the Act.'<sup>228</sup> Botha JA points out that the Act is silent on the procedure to be taken by a court when an application is brought in terms of this section. Furthermore, the Act contains no directions as to the approach a court should follow.<sup>229</sup>

This prompted Botha JA to broadly set out the views of the Appellate Division 'in regard to the procedure to be followed and the approach to be adopted under section 5(3) of the Act.'<sup>230</sup>

The Judge of Appeal states that an applicant 'for an order in terms of section 5(3)(a) ought to be obliged to nominate 'the forum of his choice' and to demonstrate '*prima facie* that his claim is enforceable in that forum.'<sup>231</sup> The Judge Botha believes further that 'this requirement is' directly linked 'to the requirement that the claimant must satisfy the Court that he has a *prima facie* case on the merits against the person against whom he wishes to institute proceedings.'<sup>232</sup>

In relation to the requirement and approach laid down in *The MV Paz*,<sup>233</sup> Botha JA thinks that those remarks set 'the test' for a *prima facie* case 'too high.'<sup>234</sup> With reference to the

<sup>224</sup> Ibid at 269G.

<sup>225</sup> *Bradbury Gretorex* supra note 110 at 533C-D.

<sup>226</sup> *The MV Thalassini* supra note 21.

<sup>227</sup> Wallis op cit note 6 at 111.

<sup>228</sup> *The MV Thalassini Avgi* supra note 21 at 829E-F.

<sup>229</sup> Ibid at 829F-G.

<sup>230</sup> Ibid at 829G.

<sup>231</sup> Ibid at 831E-F.

<sup>232</sup> Ibid at 831F.

<sup>233</sup> *The MV Paz* supra note 101 at 268A, 269G.

<sup>234</sup> *The MV Thalassini* supra note 21 at 831H.

‘analogous case of an attachment...to found jurisdiction,’ Botha JA rules ‘that an applicant need show no more than that there is evidence which, if accepted, will establish a cause of action.’<sup>235</sup>

Botha JA proceeds to set out Steyn J’s often-quoted dicta in *Bradbury Gretorex* at page 533C-E.<sup>236</sup> The Judge of Appeal states that this approach is ‘well established in cases of attachment of property to found jurisdiction (see eg *Butler v Banimar Shipping Co SA* 1978 (4) SA 753 (SE) at 757C-G and the cases cited there)’<sup>237</sup> and Botha JA comes to the conclusion that ‘it is the proper approach to be applied in applications for an arrest in term of section 5(3)(a).’<sup>238</sup>

The Judge of Appeal likewise finds that this approach can be applied ‘to the question of enforceability of the claimant’s claim in the nominated forum.’ The Judge of Appeal states that if the applicant can prove ‘*prima facie* that the nominated forum has jurisdiction to entertain the dispute,’ this would then normally end the enquiry into this part of the matter.<sup>239</sup> Finally, Botha JA proceeds to list the requirements a claimant must satisfy for an arrest under section 5(3)(a).<sup>240</sup>

According to the Appellate Division, this is the proper approach for security arrests.<sup>241</sup>

For our purposes, the significance of the *MV Thalassini Avgi* is that the Appellate Division adopted the requirement for a *prima facie* case as laid down by Steyn J in *Bradbury Gretorex*<sup>242</sup> in the case of attachments to found jurisdiction at common law and approved it as the proper approach to be applied in Admiralty law to security arrests in ‘terms of s 5(3)(a) of the Act.’<sup>243</sup>

More significantly, the dicta of Botha JA at 831H-I in the *MV Thalassini Avgi* was shortly thereafter also applied by the AD in the case of *Weissglass NO v Savonnerie Establishment*,<sup>244</sup> which dealt with the attachment of two fishing vessels ‘in terms of section 4(4)(a) of the Act.’<sup>245</sup>

The purpose behind the attachments ‘was to found jurisdiction in an action which Savonnerie Establishment,’ a Lichtenstein financing corporation, sought to bring in the Cape Provincial Division against Atlantic, an Israeli company operating in the local fishing industry,

<sup>235</sup> *Thalassini* supra note 21 at 831H-I. This passage was applied with approval in the AD cases of *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at page 936G-H and *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 579E.

<sup>236</sup> *Ibid.*

<sup>237</sup> Botha JA refers to *Butler v Banimar Shipping Co SA* 1978 (4) SA 753 (SE) at 757C-G & the cases cited therein.

<sup>238</sup> *Thalassini* supra note 21 at 831H-832B.

<sup>239</sup> *Ibid* at 832B-C.

<sup>240</sup> *Ibid* at 832I-833A. See the requirements listed *supra* in chapter 2.

<sup>241</sup> *Ibid* at 835G.

<sup>242</sup> *Bradbury Gretorex* supra note 110 at 533C-D.

<sup>243</sup> *Thalassini* supra note 21 at 831H-832C.

<sup>244</sup> *Supra* note 16.

<sup>245</sup> *Weissglass* supra note 16 at 936G-H.

for the payment of money owed to Savonnerie Establishment.<sup>246</sup> The main issue in dispute was whether the order for attachment of both vessels was properly granted by the court *a quo*.<sup>247</sup>

This issue had to be determined in accordance with the Act as Savonnerie's application for attachment and the order granted by the Cape Provincial Division were done 'in the operation of the court's admiralty jurisdiction.' Both Savonnerie and Atlantic were also '*peregrini* of the Republic.' In these circumstances, 'an attachment to found jurisdiction at common law' would ordinarily be refused since no additional *ratio jurisdictionis*<sup>248</sup> is present. However, Nestadt JA proceeds to point out that the provisions of the Act<sup>249</sup> mitigate 'the inconvenience of this rule.'<sup>250</sup> With this in mind, Nestadt JA states that 'what Savonnerie had to prove was a *prima facie* case on the merits, i.e. it had to tender evidence which, if accepted, established a cause of action (*MV Thalassini* (*supra* at 831H-I)).'<sup>251</sup> Judge Nestadt proceeds to state further, with reference to whether Savonnerie Establishment has managed to establish its *prima facie* case or not, that:

'We must be careful not to enter into the merits of the case or at this stage attempt to adjudicate on credibility, probabilities or the prospects of success.'<sup>252</sup>

In the end, Savonnerie's claims against Atlantic were not found to be 'maritime claims within the purview of section 1 of the Act.' Atlantic's application to set-aside the attachments were therefore successful.<sup>253</sup> Nevertheless, the *Weissglass* case represents the further endorsement of the approach to and requirement for a *prima facie* case, as laid down in *Bradbury Gretorex* and approved in *The Thalassini Avgi*, being applied to attachments under the Act.<sup>254</sup>

Moreover, in *Bocimar NV v Kotor Overseas Shipping Ltd*,<sup>255</sup> Corbett JA stated that an applicant for a security arrest must prove what was laid down in the *MV Thalassini Avgi* case.<sup>256</sup> However, the decision in *MV Thalassini Avgi* was handed down in respect of section 5(3)(a) of the Act before its amendment,<sup>257</sup> which amendment properly came into effect on 1 July 1992.<sup>258</sup>

<sup>246</sup> Ibid at 933D-G.

<sup>247</sup> Ibid at 933H.

<sup>248</sup> An accepted ground of jurisdiction.

<sup>249</sup> See sections 2(1), 3(1), 3(2) and 4(4)(a) of the Act.

<sup>250</sup> *Weissglass* *supra* note 16 at 933A-J.

<sup>251</sup> Ibid at 936G-H.

<sup>252</sup> Ibid at 938H.

<sup>253</sup> Ibid at 943J.

<sup>254</sup> Ibid at 936G-H.

<sup>255</sup> *Bocimar NV* *supra* note 59.

<sup>256</sup> Ibid at 578G-H.

<sup>257</sup> By section 4(d) of Act 87 of 1992.

<sup>258</sup> *Bocimar NV* *supra* note 59 at 578H-579A.

Nevertheless, the *MV Thalassini Avgi* decision remains apposite. According to Corbett JA: 'Since the principal alteration effected by the amendment was simply to include the case where the person seeking the arrest has a claim enforceable by an action *in personam*, the *Thalassini* case remains an authoritative exposition of what an applicant must establish to achieve the arrest of a ship to provide security.'<sup>259</sup>

It was also held by Corbett JA, in regard to security arrest requirement (b),<sup>260</sup> that what Botha JA 'meant by a *prima facie* case' in *The Thalassini Avgi* case (at 831H-I) was 'that the applicant need show no more than that there is evidence which, if accepted, will establish a cause of action.'<sup>261</sup> This, it was held, was 'the standard of proof' applicable 'to the establishment of the applicant's claim'<sup>262</sup> and also to the enforceability of the applicant's claim in that *forum*.<sup>263</sup>

In the *MT Tigr*,<sup>264</sup> a further case dealing with the 'attachment of property to found or confirm jurisdiction' in Admiralty law – the attachments were effected at 'the instance of the defendant to' allow it to join two *peregrini* outsiders to the proceedings for the purpose of claiming a contribution or indemnification from both of them.<sup>265</sup> In his judgment, Scott JA held:

'The requirement of a *prima facie* cause of action in relation to an attachment *ad fundandam vel confirmandam jurisdictionem* at common law has been consistently held to be that an applicant need show no more than that there is evidence which, if accepted, will establish a cause of action (*Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd* 1953 (3) SA 529 (W) at 533C--D). This test has been applied, not only in relation to attachments to found or confirm jurisdiction (as extended by s 4(4)(a)) at the instance of prospective plaintiffs in terms of s 3(2)(b) of the Act, but also to arrests at the instance of prospective plaintiffs in terms of s 3(5) of the Act and to so-called 'security arrests' in terms of s 5(3)(a). (See, for example, *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at 936E--H; *Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 831G--832B; *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 579E.)'<sup>266</sup>

<sup>259</sup> Ibid at 579A-B.

<sup>260</sup> Requirement (b), *supra*, requires the applicant to 'satisfy the Court that he has a *prima facie* case in respect of such a claim, which is *prima facie* enforceable in the nominated forum or forums of his choice....'

<sup>261</sup> *Bocimar NV* *supra* note 59 at 579E.

<sup>262</sup> Enforceable either by an action *in personam* or an action *in rem*.

<sup>263</sup> *Bocimar NV* *supra* note 59 at 579E-F.

<sup>264</sup> *MT Tigr* *supra* note 3.

<sup>265</sup> Ibid at 867B-C.

<sup>266</sup> *MT Tigr* *supra* note 3 at 868B-E.

In the next paragraph, the Judge of Appeal proceeds to state that ‘the Courts have continued to give effect to what was said by Steyn J in *Bradbury Gretorex supra* at 533D-E.’<sup>267</sup>

Finally, there is the *Great River Shipping Inc v Sunnyface Marine Ltd*<sup>268</sup> case, which is also instructive for our purposes. It concerned ‘an application for the release of a vessel’ arrested in a vindicatory action.<sup>269</sup> In July 1991, Sunnyface Marine Ltd, a Cypriot company, commenced ‘an action *in rem* in the Cape Provincial Division’ against a Panamanian company, Great River Shipping Inc, after arresting the *MV Great Eagle* while lying at Saldanha Bay. An application was then launched by Great River Shipping Inc for the vessel’s release and for ancillary relief.<sup>270</sup>

One of the grounds raised in the application of Great River Shipping Inc was that Sunnyface Marine had no *prima facie* case ‘justifying the action and the accompanying arrest.’<sup>271</sup>

On the papers, it was not in dispute between the parties that Sunnyface Marine bore the onus of proving that it had a ‘*prima facie* case on the merits’ and that ‘the arrest was justified’ (on the authority of the *Thalassini Avgi supra* at 831F-832B).<sup>272</sup> The Counsel were in agreement that Howie J had to have regard to all the evidence in dispute, despite some of it being in the form of hearsay evidence,<sup>273</sup> some of the affidavits being attested by an attorney with an interest in the matter, and, the fact that some deponents’ identities were concealed for fear of reprisal.<sup>274</sup>

The Counsel also agreed that ‘a *prima facie* case’ in this context entailed Sunnyface Marine showing ‘that there was evidence which, if accepted, would establish a cause of action’ based on the authority of *The Thalassini Avgi* (at 831F-832B).<sup>275</sup> Howie J also agreed that the same approach applied to security arrests must ‘apply to an arrest to institute an action *in rem*.’<sup>276</sup>

The Judge also concurred with Sunnyface’s qualification regarding the *Bradbury* test that: ‘On the authority of *Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd* 1953 (3) SA 529 (W) (approved and followed in the *Thalassini* at the passage cited) that the fact that the evidence relied upon by the arrestor is disputed, or that there are factual conflicts between the parties, does not warrant the setting aside of the arrest. “It is only

<sup>267</sup> Ibid at 868F.

<sup>268</sup> *Great River* supra note 30.

<sup>269</sup> Ibid at 65D.

<sup>270</sup> Ibid at 65E-H.

<sup>271</sup> Ibid at 65I-66A.

<sup>272</sup> Ibid at 70H.

<sup>273</sup> Hearsay evidence is generally always admissible by virtue of s 6(3) of the Act. See *Thalassini* supra note 21 at 842H.

<sup>274</sup> Ibid at 75B-D.

<sup>275</sup> Ibid at 75F-G.

<sup>276</sup> *Great River* supra note 30 at 75G.

where it is quite clear that he has no action or cannot succeed that an attachment should be discharged”: *Bradbury Gretorex* at 533C-E.<sup>277</sup>

Lastly, Judge Howie was also in agreement with Counsel for Great River Shipping Inc stating that the evidence to be considered in the context of a *prima facie* case does not include ‘contention, submission or conjecture.’<sup>278</sup> However, Howie J did not agree with their Counsel’s reliance on *Cochran v Miller*<sup>279</sup> (at 163G) that ‘in an application for arrest to found jurisdiction the test for a *prima facie* case is whether there is evidence which, if believed, might persuade a reasonable man to draw the inference that the wrong complained of had been committed.’<sup>280</sup>

In the Judge’s view, this seems to be the same test as applied in the context of absolution whilst the Judge thinks the test is also somewhat different to *Cochran* since ‘a *prima facie* case is established by circumstance where the inference the plaintiff seeks to have drawn is as “more or less equally open” on all the available evidence as the inference favouring the defendant.’<sup>281282</sup>

According to Howie J, these tests are also more favorable to an applicant for arrest than the *Bradbury Gretorex* test approved by the Appellate Division in the *Thalassini Avgi* (at 831H-I).<sup>283</sup> The Judge thinks that this is because ‘for example, on the premise that credibility is not in issue, merely the weight of evidence which one postulates will be believed, one asks, in the absolution context, “is the evidence such that a reasonable man might find for the plaintiff?”’ In the arrest context one is to ask: ‘Is the evidence such that the Court would find for the arrest applicant?’<sup>284</sup>

## CHAPTER 6 EVIDENCE

### 6.1 Hearsay Evidence

In comparison to the common-law position, ‘courts in the exercise of their admiralty jurisdiction’ are allowed to admit statements which qualify as ‘hearsay evidence.’<sup>285</sup> The statutory definition

<sup>277</sup> *Great River* at 75G-I.

<sup>278</sup> *Ibid* at 75H-I.

<sup>279</sup> *Cochran* supra note 178.

<sup>280</sup> *Great River* supra note 30 at 75I.

<sup>281</sup> See *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37 *in fine* and at 39A-B.

<sup>282</sup> *Great River* supra note 30 at 75J-76B.

<sup>283</sup> *Ibid* at 76B.

<sup>284</sup> *Ibid* at 76B-C.

<sup>285</sup> *Hare op cit* note 35 at 160. See also *Thalassini* supra note 21 at 842B and *The Wisdom C* at 589H-I.



of 'hearsay evidence' refers to 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.'<sup>286</sup>

The reason for admitting hearsay, or even 'double hearsay', evidence in the realm of Admiralty law has to do with the urgent nature of an arrest and the fact that information has often been communicated to a local attorney in circumstances where the local attorney is then forced to depose to an affidavit in support of the arrest.<sup>287</sup> This attorney will acknowledge the sources of its information, the standing of the person(s) who conveyed such information as well as declare that the attorney believes such information 'to be true and correct' in the application for arrest.<sup>288</sup>

Section 6(3) of the Act is the main provision dealing with 'hearsay evidence.' It sets out 'that a court may in the exercise of its admiralty jurisdiction receive as evidence statements which would otherwise be inadmissible as being in the nature of hearsay evidence, subject to such directions and conditions as the court thinks fit.'<sup>289</sup> Section 6(4) adds 'that the weight to be attached to evidence contemplated in subsection (3) shall be in the discretion of the court.'<sup>290</sup>

Therefore, our courts have the discretion 'in the exercise of their admiralty jurisdiction to admit hearsay evidence' in terms of the Act.<sup>291</sup> In the *MV Thalassini Avgi*,<sup>292</sup> the Appellate Division held that although the normal prerequisites 'applied by our courts in the exercise of their general jurisdiction,' such as 'the urgency of the arrest' and 'the disclosure of the source of that information,' will be looked at when considering 'the exercise of this discretion,' there is no reason to comply with these prerequisites when choosing to exercise the court's discretion.<sup>293</sup>

The *MV Thalassini Avgi*<sup>294</sup> is the seminal case dealing with the 'admissibility of hearsay evidence' in Admiralty law and sets out the 'general approach to be followed' in terms of s 6(3).<sup>295</sup> According to Botha JA, the 'general approach to be followed' when applying section 6(3) of the Act 'should be lenient rather than strict; the court should, speaking generally, incline to letting hearsay statements go in and to assess the weight to be attached to them under s 6(4)

<sup>286</sup> The Law of Evidence Amendment Act 45 of 1988, s 3(4). See also Schwikkard & van der Merwe op cit note 51 at 22.

<sup>287</sup> Hofmeyr op cit note 33 at 237.

<sup>288</sup> Ibid at 237.

<sup>289</sup> The Admiralty Jurisdiction Regulation Act 105 of 1983, s 6(3).

<sup>290</sup> The Admiralty Jurisdiction Regulation Act 105 of 1983, s 6(4).

<sup>291</sup> *MT Tigr* supra note 3 at 868H.

<sup>292</sup> Supra note 21.

<sup>293</sup> *The MV Thalassini* supra note 21 at 842C-D.

<sup>294</sup> Supra note 21.

<sup>295</sup> Hare op cit note 35 at 160.

when considering the case in its totality; and a decision to exclude such statements should normally be taken only when there is some cogent reason for doing so.<sup>296</sup>

When the evaluation of hearsay evidence is in issue, the court will weigh such factors as whether the source of the evidence has been satisfactorily disclosed or not.<sup>297</sup> Nevertheless, it was stated in *Hasselbacher Papier Import and Export (Body Corporate) v MV Stavroula*,<sup>298</sup> that where certain hearsay evidence is denied, the court would be slow to base a finding or attach much weight to that evidence.<sup>299</sup> However, Burger J opines that 'where there is after due notice no denial of such evidence on record, the dangers inherent in hearsay evidence' are much less.<sup>300</sup>

In the *SY Sandokan*,<sup>301</sup> it was held that direct evidence will, all things being equal, be preferred to hearsay evidence and that where issues of credibility arise, the former is preferred.<sup>302</sup>

Thus, Scott JA stated in *The MT Tigr*,<sup>303</sup> in relation to the 'prima facie case' requirement 'in the realm of attachments to found jurisdiction'<sup>304</sup> and the admission of hearsay evidence, that:

'In admiralty cases the evidence tendered and accepted by the Courts for the purpose of establishing a *prima facie* cause of action is almost invariably of a hearsay nature. Even 'double hearsay' evidence from an undisclosed source has been accepted for this purpose (see the *MV Thalassini Avgi* case *supra* at 841C--843D). It follows that the level of the test applied is, generally speaking, a low one even in the type of applications for attachment or arrest to which reference has just been made.'<sup>305</sup>

## 6.2 Contentions, Submissions and Conjecture not sufficient

In deciding whether 'a *prima facie* case' exists, the nature of the evidence which 'a court will consider does not include contentions, submissions or conjecture.'<sup>306</sup> This was the qualification to the test set down by Steyn J in *Bradbury Gretorex* and approved by the AD in *The MV Thalassini Avgi*, which the single bench of the CPD then decided in *Great River Shipping Inc.*<sup>307</sup>

<sup>296</sup> *Thalassini* *supra* note 21 at 842G-H.

<sup>297</sup> Hofmeyr op cit note 33 at 238.

<sup>298</sup> *Hasselbacher Papier Import and Export (Body Corporate) v MV Stavroula* 1987 (1) SA 75 (C).

<sup>299</sup> *Ibid* at 80D-E. See also Hofmeyr op cit note 33 at 238.

<sup>300</sup> *Hasselbacher Papier* *supra* note 298 at 80E.

<sup>301</sup> *SY Sandokan: Owner of the SY Sandokan v Liverpool and London Steamship Protection and Indemnity Association Ltd* 2001 (3) SA 824 (D).

<sup>302</sup> *Ibid* at 830B.

<sup>303</sup> *The MT Tigr* *supra* note 3.

<sup>304</sup> Or to confirm jurisdiction at common law.

<sup>305</sup> *The MT Tigr* *supra* note 3 at 868H-I.

<sup>306</sup> Hofmeyr op cit note 33 at 124.

<sup>307</sup> *Great River* *supra* note 33 at 75I.

Similarly, Judge Erasmus also held in *The MFV Logan Ora: R D Summers Fisheries CC v Viking Fishing Co (Pty) Ltd*,<sup>308</sup> that ‘averments in the form of conclusions are not in themselves sufficient to satisfy the test laid down by Botha JA in the case of *MV Thalassini Avgi*.’<sup>309</sup>

For evidence in this manner to be acceptable, it should rather constitute ‘allegations of fact as opposed to mere assertions.’<sup>310</sup> In *Hülse-Reutter v Gödde*,<sup>311</sup> Scott JA held ‘it is only when the assertion amounts to an inference which may reasonably be drawn from the facts alleged,’ that it can be taken to bear any weight. Moreover, while some leeway will be permitted, the ordinary principles which arise when reasoning in this manner must not be overlooked by our courts.<sup>312</sup>

In relation to the ordinary principles that arise when reasoning by inference, it was stated:

‘The inquiry in civil cases is, of course, whether the inference sought to be drawn from the facts proved is one which by balancing probabilities is the one which seems to be the more natural or acceptable from several conceivable ones. (See *Govan v Skidmore* 1952 (1) SA 732 (N) at 734B-D as explained by Holmes JA in *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B -D.)’<sup>313</sup>

In order ‘for a *prima facie* case to be established’ and made out in the papers, it was accordingly held in *The Maritime Valour: SA Marine Corporation SA v Valour Navigation Company Ltd*<sup>314</sup> that in so far as the applicant relies on inferences drawn from the facts alleged or upon conclusions – the court ought to be satisfied that these inferences or conclusions indeed ‘follow as a matter of probability from the factual material upon which the applicant relies.’<sup>315</sup>

However, in the second edition of his textbook, Hofmeyr submits that the Judge erred in making this finding since the author believes that for ‘a *prima facie* case to be made out,’ it need only be established that ‘the inference is one which may reasonably be drawn from the facts alleged.’<sup>316</sup> Support for this submission can be found in *Hülse-Reutter* where it was held that if this were not the position; the requirement for a *prima facie* case would become all but futile.<sup>317</sup>

<sup>308</sup> *The MFV Logan Ora* 1999 (4) SA 1081 (SE).

<sup>309</sup> *Ibid* at 1091H.

<sup>310</sup> *Hülse-Reutter* supra note 11 at 1344C.

<sup>311</sup> Supra note 11.

<sup>312</sup> *Ibid* at 1344C.

<sup>313</sup> *Hülse-Reutter* supra note 11 at 1344C-D.

<sup>314</sup> *The Maritime Valour* 2003 (SCOSA) B293 (D).

<sup>315</sup> *Ibid* at B303-304. See also *Great River* supra note 30 at 75; *Govan v Skidmore* 1952 (1) SA 732 (N) at 743.

<sup>316</sup> Hofmeyr op cit note 33 at 124-125 footnote 140.

<sup>317</sup> *Hülse-Reutter* supra note 11 at 1344E-F. See also Hofmeyr op cit note 33 at 125.

In *The Sylvia: Progress Bulk Carriers Ltd v Silvia Shipping Co Ltd and Another*,<sup>318</sup> Levinsohn DJP also cautioned against drawing inferences from mere speculative theories. The Deputy Judge President believing that we should rather draw inferences from the objective facts of the case.<sup>319</sup> Hofmeyr believes that this statement requires qualification. In Hofmeyr's opinion, if the court is trying to 'determine whether a *prima facie* case exists,' the court will take into account the facts as alleged by the claimant in concert with any facts that are common cause.<sup>320</sup>

Hofmeyr accordingly makes the point that 'if these give rise to an inference, that inference will not, for the purposes of determining whether a *prima facie* case exists, be defeated by facts alleged by the [respondent] and not admitted by the [applicant] which negate that inference.'<sup>321</sup>

Finally, and as referred to above in *Venter v Credit Guarantee Insurance Corporation*,<sup>322</sup> it is trite law that where the matter in question is 'peculiarly within the knowledge of the respondent,' less evidence will need to be shown 'to establish a *prima facie* case.'<sup>323</sup> Where the respondent has knowledge of the facts, and, is capable of rebutting those allegations but chooses against doing so, this is in itself is a factor reinforcing the *prima facie* case before the court.<sup>324325</sup>

### 6.3 Relaxation of the Test

It has been shown thus far 'that an applicant must establish a *prima facie* case' against the respondent in order to obtain an order for the arrest or attachment of the latter's property.<sup>326</sup> However, the requirement for a *prima facie* case has also been relaxed by our courts in certain circumstances.<sup>327</sup> This is what transpired in the SCA cases – *The Tigr*<sup>328</sup> and *The Summit One*.<sup>329</sup>

In *The Tigr* (*supra*) an application for attachment was brought by the defendant to allow it to join two third party *peregrini* to the action so as to claim an indemnification or contribution.<sup>330</sup>

The SCA held that 'a defendant who denies liability but who seeks to attach the property of a *peregrinus* with a view to joining him as a third party...need not produce evidence under oath

<sup>318</sup> *The Sylvia* 2008 (5) SA 562 (N).

<sup>319</sup> *Ibid* at 570A-B.

<sup>320</sup> Hofmeyr op cit note 33 at 125 footnote 142.

<sup>321</sup> *Ibid* at 125 footnote 142.

<sup>322</sup> *Supra* note 49 at 977H-978A.

<sup>323</sup> *The Gina* 2011 (2) SA 547 (KZD) para 8.

<sup>324</sup> On the authority of the *Hasselbacher Papier Import* case, *supra* note 298.

<sup>325</sup> *The Gina* *supra* note 323 para 8. See also Hofmeyr op cit note 33 at 125.

<sup>326</sup> Hofmeyr op cit note 33 at 125.

<sup>327</sup> *Hülse-Reutter* *supra* note 11 at 1344F.

<sup>328</sup> *Supra* note 3.

<sup>329</sup> *The Summit One* 2005 (1) SA 428 (SCA).

<sup>330</sup> *The Tigr* *supra* note 3 at 868I.

which if accepted would establish the defendant's liability to the plaintiff.<sup>331</sup> But, it is patent that the facts of this case differ to the previous circumstances in which the requirement for a *prima facie* case have been considered by our courts and arrest or attachment orders granted.<sup>332</sup>

*The Summit One* dealt with the joinder of alternative defendants in circumstances where the plaintiff was seeking to sue on a contract but was not sure 'whether the other party was acting as principal or agent.'<sup>333</sup> It was held that 'although the particular circumstances in the *Tigr* were somewhat different from those of the present case, in both cases the *prima facie* case sought to be established and other averments made by the applicant were mutually destructive.'<sup>334</sup> It was found that in these circumstances, the court should rather have regard to those allegations contained in the pleadings so as to determine 'whether a *prima facie* case has been made out.'<sup>335</sup>

#### 6.4 Cases Made Out In Reply

In the *MV Wisdom C: United Enterprises Corporation v STX Pan Ocean Co Ltd*,<sup>336</sup> the appellants contended that the respondent had failed to put-up sufficient facts to establish a *prima facie* case. This contention arose because certain material facts were omitted from the founding affidavit (although they were included in its replying affidavit in the setting-aside application).<sup>337</sup>

This led appellants to argue that the respondent had failed to satisfy this part of its case and that the respondent's case 'had to stand or fall by what was' contained in its original papers.<sup>338</sup>

Farlam JA consulted the relevant case law and found that the authorities were against this argument. In support, Farlam JA referred to the passage of Marais J in *Transol Bunker BV v MV Andrico Unity*,<sup>339</sup> which was approved by the Appellate Division in the *MV Thalassini Avgi*.<sup>340 341</sup>

In this passage from the *MV Andrico Unity* (*supra*), Judge Marais proceeded to find that:

'It would serve no good purpose to set aside an arrest, knowing full well that a sound basis for the arrest does indeed exist, merely because the party who obtained the order failed to rely upon it initially. It would ordinarily simply result in a new application for arrest being

<sup>331</sup> *The Tigr* *supra* note 3 at 870I-871A.

<sup>332</sup> *Ibid* at 869I.

<sup>333</sup> *Supra* note 329 at 438A.

<sup>334</sup> *Ibid* at 438A.

<sup>335</sup> Hofmeyr *op cit* note 33 at 125.

<sup>336</sup> *MV Wisdom C* 2008 (3) SA 585 (SCA).

<sup>337</sup> *Ibid* para 15.

<sup>338</sup> *Ibid* para 15.

<sup>339</sup> *Supra* note 119.

<sup>340</sup> *MV Thalassini* *supra* note 21 at 834F-G.

<sup>341</sup> *MV Wisdom C* *supra* note 336 para 16.

launched in which precisely the same issue would have to be considered. That is manifestly wasteful of both time and money.<sup>342</sup>

Judge Farlam agreed with these considerations and applied them in *The MV Wisdom C*.<sup>343</sup>

Thus, if the applicant for arrest does not allege sufficient facts 'to establish a *prima facie* case in' its founding affidavit, this applicant can overcome this defect in its replying affidavit.<sup>344</sup>

In the exercise of their general jurisdiction, our courts will normally try and adhere to the 'ordinary procedural rules' found in application proceedings. In effect, these rules are in place to stymie the applicant (or respondent in an application to set-aside an attachment at common law) from changing its case in reply. However, the position is different in Admiralty jurisdiction.<sup>345</sup>

On the contrary, Admiralty Proceedings Rule 9 provides that 'it shall not be an objection to any further...replying affidavit or further affidavit after a replying affidavit that it raises new matter or...that it constitutes a departure from a previous allegation made by the same party and any such departure shall be deemed to be in the alternative to any such previous allegation.'<sup>346</sup>

In this regard to rule of Admiralty law, Hofmeyr makes the following statement that: 'The Rule reflects the general approach in admiralty which is to avoid unnecessary formality and encourage expedition. If an applicant is prevented from adducing new matter in reply this may simply result in the applicant bringing a new application involving further costs and delay. Prejudice to the respondent can be avoided by allowing the respondent to file further affidavits together with an adjournment and an order that the respondent pay the wasted costs.'<sup>347</sup>

In light of this passage, it is clear that in Admiralty practice – the applicant for arrest (or attachment under the Act) is in a more favorable position and it can supplement its case in reply.

## CHAPTER 7 ATTACHMENTS AND SECURITY ARRESTS

### 7.1 Common Law Attachments

At 'common law, an attachment to found (or confirm) jurisdiction' connotes the attachment of the property of a *peregrinus*<sup>348</sup> with the aim of making that person amenable to the jurisdiction of

<sup>342</sup> *MV Andrico Unity* supra note 119 at 799H-I.

<sup>343</sup> *MV Wisdom C* supra note 336 at paragraph 16.

<sup>344</sup> Hofmeyr op cit note 33 at 169.

<sup>345</sup> Ibid at 170.

<sup>346</sup> Admiralty Proceedings Rule 9(3)(c).

<sup>347</sup> Hofmeyr op cit note at 170 at footnote 361.

<sup>348</sup> A person who is domiciled and resident in a foreign country.

the South African court.<sup>349</sup> Furthermore, a *peregrinus* applicant may bring an 'application for the attachment of the property of' another *peregrinus* if the cause of action arose in South Africa.<sup>350</sup>

In other words, if the applicant and respondent are both *peregrini*; 'an attachment to found jurisdiction (at common law)' alone will not suffice to 'establish jurisdiction,' there must also 'be a recognised *ratio jurisdictionis*' present. If not, an attachment application will be dismissed.<sup>351</sup> This is the *ratio decidendi* of the Appellate Division case of *Siemens Ltd v Offshore Marine Engineering Ltd*,<sup>352</sup> where it was held by Hoexter JA that 'both a recognised *ratio jurisdictionis*' and 'an attachment of the property' are needed to found the court's jurisdiction.<sup>353</sup>

The true purpose behind the attachment procedure is 'to avoid the costs and inconvenience which would have otherwise have to be incurred by an *incola* in following the debtor to his own court.'<sup>354</sup> For this reason, Judge Steyn stated in *Bradbury Gretorex (supra)* that 'the remedy, therefore, however exceptional, is one intended primarily for the benefit of the *incola*.'<sup>355</sup>

The practice of attachments 'to found (or confirm) jurisdiction was established by the tribunals of Holland',<sup>356</sup> for 'the interests of *incolae*',<sup>357</sup> and for 'considerations of commercial convenience.'<sup>358</sup> In addition to 'establishing jurisdiction and to commence proceedings,' an attachment has since then also had an additional purpose – that for the 'provision of security.'<sup>359</sup> In serving as security for the debt,<sup>360</sup> it thus provides 'an asset in respect of which execution can be levied in the event of judgment being granted in favour of the party seeking the attachment.'<sup>361</sup>

The 'principle of effectiveness' is considered to be the rationale for jurisdiction and it has been stated that an attachment to found jurisdiction 'is historically and logically closely related to this principle.'<sup>362</sup> However, this rationale or principle is now being noticeably 'whittled away.'<sup>363</sup>

<sup>349</sup> Herbststein and Van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5ed by AC Cilliers, C Loots and HC Nel, Juta and Co Ltd 2009 at 95.

<sup>350</sup> Ibid at 102.

<sup>351</sup> *Ewing v McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) at 258I-259D.

<sup>352</sup> *Siemens Ltd v Offshore Marine Engineering Ltd* 1993 (3) SA 913 (A).

<sup>353</sup> Ibid at 928F-G.

<sup>354</sup> *Bradbury Gretorex* supra note 110 at 532D.

<sup>355</sup> Ibid at 532D-E.

<sup>356</sup> *Naylor v Jansen; Jansen v Naylor* [2005] 4 All SA 26 (SCA) para 27.

<sup>357</sup> *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA) para 4.

<sup>358</sup> *The Owners, Master and Crew of the SS Humber v Owners and Master of the SS Answald* 1912 AD 546 at 555.

See also *Naylor v Jansen* supra note 356 para 27.

<sup>359</sup> *Tsung* supra note 357 para 4.

<sup>360</sup> *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 306B-307A.

<sup>361</sup> *The MT Tigr* supra note 3 at 870B-C. See also *Naylor v Jansen* supra note 356 para 26.

<sup>362</sup> *Tsung* supra note 357 at 181C.

<sup>363</sup> Herbststein & Van Winsen op cit note 349 at 97. See *Kasimov v Kurland* 1987 (4) SA 76 (C) at 80A.

In *Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries*,<sup>364</sup> Ogilvie Thompson JA said that this principle ‘has been considerably eroded by the long-established practice of our courts’<sup>365</sup> through permitting ‘attachment, to found or confirm jurisdiction, of property whose value bears no realistic relationship to the amount of the claim advanced in the proposed litigation.’<sup>366</sup>

According to Ogilvie Thompson JA:

‘The authorization of such attachments to found or confirm jurisdiction – which Pollak, *South African Law of Jurisdiction*, pp. 28 and 65, calls an attachment of property of trifling values – has, no doubt, largely been actuated by the desire of our Courts to assist *incolae* to litigate at home.’<sup>367</sup>

Hence, in *Hülse-Reutter v Gödde*,<sup>368</sup> it was stated ‘that the primary object of an attachment is to establish jurisdiction,’<sup>369</sup> while in *Tsung v IDC*,<sup>370</sup> Harms JA affirmed that ‘not only has the principle of effectiveness been eroded (Forsyth says ‘it is artificial and conceptual rather than realistic’), effectiveness is also not necessarily a criterion for the existence of jurisdiction.’<sup>371</sup>

Therefore, it would seem not only that this principle is being ‘eroded’ in our law but that the courts are paying lip-service to the secondary purpose of an attachment as security for a debt. Moreover, our courts will now order an attachment where the property is ‘trifling in value.’

In *Weissglass NO v Savonnerie*,<sup>372</sup> Nestadt JA stated that ‘an application for attachment is but a preliminary step to the institution of an action. There is no decision on the merits. The matter is brought *ex parte* and adjudicated on affidavit. Only a *prima facie* case has to be made out.’<sup>373</sup> However, the Supreme Court of Appeal and our lower courts have also pointed out that an attachment ‘is an exceptional remedy and one that should be applied with care and caution.’<sup>374</sup>

Nevertheless, once the requirements for an attachment order are met – our courts do not have the discretion to refuse the order.<sup>375</sup> In *Longman Distillers v Drop Inn*,<sup>376</sup> the AD ruled that:

<sup>364</sup> Supra note 360.

<sup>365</sup> At 300H, Ogilvie Thompson JA refers to decisions such as *Ex parte Smith* 1912 CPD 45 and *McKinery Construction Co Ltd v Aktiebologat Tratalja* 1922 CPD 24 (and cf. *Central African Airways Corporation v Vickers Armstrong Ltd* 1956 (2) SA 492 (FC) and *Herbstein & van Winsen*, supra, 708) in support hereof.

<sup>366</sup> *Thermo Radiant* supra note 360 at 300G-H.

<sup>367</sup> Ibid at 301A.

<sup>368</sup> *Hülse-Reutter* supra note 11.

<sup>369</sup> Ibid at 1343H. See also Wallis op cit note 6 at 111-112.

<sup>370</sup> *Tsung* supra note 357.

<sup>371</sup> Ibid para 6.

<sup>372</sup> *Weissglass* supra note 16.

<sup>373</sup> Ibid at 940G-H.

<sup>374</sup> *Ex parte Acrow Engineers (Pty) Ltd* 1953 (2) SA 319 (T) at 321G-H; *Thermo Radiant* supra note 360 at 302C-D.

<sup>375</sup> *Simon NO v Air Operations of Europe AB* 1999 (1) SA 217 (SCA) at 228F.



‘In our law, once an *incola* applicant (plaintiff) establishes that *prima facie* he has a good cause of action against the peregrine respondent (defendant), the Court must, if other requirements are satisfied, grant an order for the attachment *ad fundandam* of the property of the peregrine respondent (defendant). It has no discretion (Pollak *The South African Law of Jurisdiction* at 64, citing *Lecomte v W and B Syndicate of Madagascar* 1905 TS 696 at 702.) The Court will not inquire into the merits or whether the Court is a convenient forum in which to bring the action (Pollak (*ibid*)). Nor, it is conceived, will the Court inquire whether it is ‘fair’ in the circumstances for an attachment order to be granted.’<sup>377</sup>

## 7.2 Attachments under the Act (Attachments *in Personam*)

In essence, the action *in personam* is the ‘civil enforcement remedy’ of our courts in the exercise of their general jurisdiction.<sup>378</sup> But section 3(2)(b) of the Act has extended the range of the action to include a jurisdiction which did not exist in Admiralty law prior to the enactment of the Act.<sup>379</sup> Section 4(4)(a) of the Act also ‘extends the scope of common-law attachments to found jurisdiction to admiralty matters,’<sup>380</sup> since this section provides that ‘a court in the exercise of its admiralty jurisdiction may make as order for the attachment of the property concerned although the claimant is not an *incola* either of the area of jurisdiction of that court or of the Republic.’<sup>381</sup>

In *Weissglass NO v Savonnerie Establishment*,<sup>382</sup> Nestadt JA said that ‘parliament must therefore be taken to have intended that the relevant principles of the common law should apply to applications under this section (even though a *peregrinus* may be the applicant).’<sup>383</sup> An attachment under the Act is therefore different to an attachment at common law because our courts in exercising their admiralty jurisdiction may grant an attachment *in personam* even though the applicant is not an *incola* of a ‘specific division of the high court or the Republic.’<sup>384</sup>

In terms of section 2(1) of the Act, jurisdiction in admiralty exists (‘in relation to a maritime claim’) notwithstanding the place where the claim arose, the place of registration of the

<sup>376</sup> *Longman Distillers* supra note 89.

<sup>377</sup> *Ibid* at 914E-G.

<sup>378</sup> See Hare op cit note 35 at 1-9; Bradfield op cit note 88 para 10.

<sup>379</sup> Hofmeyr op cit note 33 at 188; *Shipping Corporation of India v Evdomon Corporation* 1994 (1) SA 550 (A) at 562H-I.

<sup>380</sup> *Weissglass* supra note 16 at 937E.

<sup>381</sup> The Admiralty Jurisdiction Regulation Act, section 4(4)(a).

<sup>382</sup> *Weissglass* supra note 16.

<sup>383</sup> *Ibid* at 937E-F.

<sup>384</sup> Hofmeyr op cit note 33 at 188.

ship or the residence, domicile or nationality of its owner.<sup>385</sup> The Act, therefore, expressly provides that an action *in personam* can today be launched by a *peregrine* plaintiff against a *peregrine* defendant,<sup>386</sup> in circumstances where no recognised *ratio jurisdictionis* is present.<sup>387</sup>

In *Weissglass v Savonnerie* (*supra*) it was contended that section 4(4)(a) of the Act gave ‘the courts a discretion whether or not to’ award an attachment under the Act.<sup>388</sup> Nestadt JA held:

‘It is true that there is authority in support of the proposition that s 4(4)(a) confers a discretion on the Court (as, for example, *Mediterranean Shipping Co v Speedwell Shipping Co Ltd and Another* 1986 (4) SA 329 (D) at 336C; see, too, *Shaw* (*op cit* at 49-51)). But in my view this is not correct. Save possibly where the application is an abuse of the Court’s process or in some other exceptional case, the remedy provided by the section is not a discretionary one. The use of ‘may’ in a statute is not conclusive of the Legislature having intended to confer a discretion on the Court. It may indicate the conferral of a power coupled with a duty to use it (*Commissioner for Inland Revenue v I H B King; Commissioner for Inland Revenue v A H King* 1947 (2) SA 196 (A) at 209). This is the position here.’<sup>389</sup>

Finally, if a ship ‘has been attached to found (or confirm) jurisdiction,’ the owner can only obtain its release from attachment by putting up security for the entire claim.<sup>390</sup> This is subject to section 5(2) of the Act and Admiralty Rule 4(7), even if it exceeds the property’s actual value.<sup>391</sup> This position is in contrast to an arrest *in rem*, where the security furnished ‘is limited to the value of the claim (plus interest and costs) or the value of the asset, whichever is the lesser.’<sup>392</sup>

### 7.3 Security Arrests

Section 5(3)(a) in the Act is the security arrest provision and it provides the following:

‘A court may in the exercise of its admiralty jurisdiction order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of an arbitration or any proceeding contemplated, pending or proceeding, either in the Republic or elsewhere, and whether or not it is subject to the law of the Republic, if the person seeking the arrest has a claim enforceable by an action *in personam* against the owner of the property concerned or

<sup>385</sup> Admiralty Jurisdiction Regulation Act, s 2(1).

<sup>386</sup> Provided that the property is within the Court’s area of jurisdiction.

<sup>387</sup> Admiralty Jurisdiction Regulation Act, s 4(4)(a). See too *The Snow Delta* 2000 (4) SA 746 (SCA) at 750D-E.

<sup>388</sup> *Weissglass* *supra* note 16 at 937A-B.

<sup>389</sup> *Ibid* at 937B-D.

<sup>390</sup> Wallis *op cit* note 6 at 348.

<sup>391</sup> Hofmeyr *op cit* note 33 at 174.

<sup>392</sup> Hare *op cit* note 35 at 91.

an action *in rem* against such property or which would be so enforceable but for any such arbitration or proceedings.<sup>393</sup>

The 'security arrest procedure' is a novel jurisdiction vested in our courts.<sup>394</sup> It entitles the claimant to arrest any property as security for its claim, thereby going beyond the particular category of property for which an arrest *in rem* is confined to under section 3(5) of the Act.<sup>395</sup> If the court has jurisdiction, it can also order that security be furnished in an action *in personam*.<sup>396</sup>

The property to be arrested as security must, however, have a 'reasonably substantial value'.<sup>397</sup> In this respect, a security arrest is different from an attachment because while the value of the property arrested is an important consideration in a security arrest application, 'the value of the property attached' may be 'trifling' or 'minuscule' in relation to the quantum of the claim.<sup>398</sup> Thus, the clear object of s 5(3) is to assist litigants, both locally and abroad, to obtain security for their claims but the quantum of the security ordered may also resolve the dispute.<sup>399</sup>

In *The Zlatni Piasatzi*,<sup>400</sup> the court held that a 'security arrest' is a device to bring property and not a litigant before court, therefore exhibiting the 'characteristics of a proceeding *in rem*'.<sup>401</sup> In comparison to an arrest *in rem*, however, the purpose behind a security arrest is to provide the claimant with 'a tangible asset against which to execute' and is not to establish jurisdiction.<sup>402403</sup>

The consequence of a security arrest is that security to the value of the *res* needs be put-up to release the vessel from arrest, and not security 'for the full value of the claim'.<sup>404</sup> This was the conclusion reached by the CPD in *The Zlatni Piasatzi*,<sup>405</sup> where Conradie J relied on and applied the then Admiralty Rule 3(5)(a).<sup>406</sup> Although this rule has now been amended, Hofmeyr submits that *The Zlatni Piasatzi* case is still good law and that security will still be put-up on this basis.<sup>407</sup>

<sup>393</sup> Admiralty Jurisdiction Regulation Act, s 5(3).

<sup>394</sup> Wallis op cit note 6 at 118.

<sup>395</sup> Hare op cit note 35 at 117.

<sup>396</sup> *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) at 372C.

<sup>397</sup> *The Ever Growth: Green Africa Shipping (Pty) Ltd v HIFU Electronic Trading CC* 2003 SCOSA B251 (D). See too Bradfield op cit note 88 at paragraph 18 at footnote 3.

<sup>398</sup> Hofmeyr op cit note 33 at 177.

<sup>399</sup> Wallis op cit note 6 at 119.

<sup>400</sup> *The MV Zlatni Piasatzi* 1997 (2) SA 569 (C).

<sup>401</sup> Ibid at 575B-D.

<sup>402</sup> *Continental Illinois National Bank and Trust Co of Chicago v Greek Seamen's Pension Fund* 1989 (2) SA 515 (D) at 537.

<sup>403</sup> Hofmeyr op cit note 33 at 177.

<sup>404</sup> Hare op cit note 35 at 154.

<sup>405</sup> Supra note 400.

<sup>406</sup> *The Zlatni Piasatzi* at 576H-J.

<sup>407</sup> Hofmeyr op cit note at 174.

Although s 5(3)(a) contains the word ‘may’,<sup>408</sup> the Appellate Division have held that once the requirements for a security arrest have been met, the applicant is entitled to its security unless the respondent puts up countervailing evidence to dissuade the Judge not to award the order.<sup>409</sup> Absent any countervailing evidence, our courts do not have the discretion to decline the order.<sup>410</sup>

A security arrest can and is often launched *ex parte* so the applicant for arrest must make a full disclosure to the court in its founding affidavit in regard to all the relevant circumstances.<sup>411</sup>

In *The Rizcun Trader* (4),<sup>412</sup> Van Reenen J issued the following warning:

‘As by the very nature thereof an *ex parte* application has to be decided on a one-sided version of the events and, more particularly, as the evidentiary criterion is *prima facie* proof, the *uberrima fides* rule places a duty on a litigant who approaches the Court in an application of that nature to disclose every circumstance which might influence the Court in deciding to grant or withhold relief.’<sup>413</sup>

The applicant’s failure to make a full disclosure in its papers – whether willful or *mala fide* – may cause the court to use its discretion and set-aside the security arrest order.<sup>414</sup> This has to do with the fact that applications of this nature are commonly brought on an urgent basis, they are presided over by duty judges with busy workloads and the order is often given after-hours.<sup>415</sup>

In *Knox D’Arcy Ltd and Others v Jamieson and Others*,<sup>416</sup> Stegmann J made the following comments in relation to an interim interdict order (which is granted in similar circumstances):

‘The making of an order which affects an intended defendant’s rights, in secret, in haste, and without the intended defendant having had any opportunity of being heard, is grossly undesirable and contrary to fundamental principles of justice. It can lead to serious abuses and oppressive orders which may prejudice an intended defendant in various ways, including some ways that may not be foreseeable.’<sup>417</sup>

On appeal, Grosskopf JA agreed with these comments but added that this is more so where the evidence is largely of an ‘untested hearsay nature.’<sup>418</sup> But where a security arrest order is

<sup>408</sup> Hare op cit note 35 at 119.

<sup>409</sup> *Thalassini* supra note 21 at 833A-C. See too Bradfield op cit note 88 para 18.

<sup>410</sup> Ibid at 833A-C. See Hofmeyr op cit note 33 at 181 footnote 41 for further cases.

<sup>411</sup> Hofmeyr op cit note 33 at 181.

<sup>412</sup> *The Rizcun Trader* (4) 2000 (3) SA 776 (C).

<sup>413</sup> Ibid at 793I.

<sup>414</sup> Ibid at 793I-794E, 799D-E. See too Bradfield op cit note 88 para 18.

<sup>415</sup> *The Rizcun Trader* (4) supra note 412 at 794B.

<sup>416</sup> *Knox D’Arcy Ltd and Others v Jamieson and Others* 1994 (3) SA 700 (W).

<sup>417</sup> Ibid at 707J-708A.

<sup>418</sup> *Knox D’Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 379F-G.

granted *ex parte*, it is handed down on a provisional and interlocutory basis. Furthermore, if the application to set the arrest aside is brought within a reasonable time; the initial order for the arrest can be varied, reconsidered or even rescinded on the basis of 'good cause' being shown.<sup>419</sup>

## CHAPTER 8 CONCERNS – *PRIMA FACIE* CASE REQUIREMENT AND APPROACH

In relation to attachments, it has been shown that the '*prima facie* case' requirement 'in an application for attachment to found (or confirm) jurisdiction' at common law is fulfilled where:

'There is evidence which, if accepted, will show a cause of action and that the mere fact that such evidence is contradicted will not disentitle the applicant to relief – not even if the probabilities are against him. It is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused. (*MT Tigr: Owners of the MT Tigr and Another v Transnet Ltd t/a Portnet (Bouygues Offshore SA and Another Intervening)* 1998 (3) SA 861 (SCA) at 868B--H).'<sup>420</sup>

In addition, it has been shown that 'the test' laid down by Judge Steyn in *Bradbury Gretorex*<sup>421</sup> has also been applied by our Provincial Divisions and Supreme Court of Appeal.<sup>422</sup>

In *Dabelstein v Lane and Fey NNO*,<sup>423</sup> Hefer ADCJ recently remarked 'that the time may come to reconsider this approach' because 'an order for an attachment *ad fundandam jurisdictionem* is an extraordinary remedy which should be applied with care and caution.'<sup>424</sup> In reconsidering this approach, Hefer ADCJ felt that those 'allegations in a respondent's opposing affidavit which the applicant cannot contradict must weigh in the assessment of the evidence.'<sup>425</sup>

In *Hülse-Reutter*,<sup>426</sup> Scott JA said that the justification for this 'low-level test is' because:

'The primary object of an attachment is to establish jurisdiction; once that is done the cause of action will in due course have to be established in accordance with ordinary standard of proof in subsequent proceedings...No doubt for this reason Nestadt JA, in the Weissglass case ...warned that a court 'must be careful not to enter into the merits of the case or at this stage to attempt to adjudicate on credibility, probabilities or the prospects of success.'<sup>427</sup>

<sup>419</sup> Hofmeyr op cit note 33 at 182. See too Uniform Rule of Court 6(11), not excluded by Admiralty Rule 24.

<sup>420</sup> *Simon No* supra note 375 at 228C-D.

<sup>421</sup> Supra note 110.

<sup>422</sup> *Hülse-Reutter* supra note 11 para 12. See *Thalassini* supra note 21 at 831F-832B; *Weissglass* supra note 16 at 936E-H.

<sup>423</sup> *Dabelstein* supra note 9.

<sup>424</sup> Ibid para 7.

<sup>425</sup> Ibid.

<sup>426</sup> *Hülse-Reutter* supra note 11.

<sup>427</sup> Ibid at 1343G-H.

Nevertheless, it became unnecessary for Hefer ADCJ in *Dabelstein v Lane and Fey* (*supra*) to decide how the current approach should be reconsidered based on the Judge's view of the matter.<sup>428</sup> Similarly, in *Hülse-Reutter v Gödde*,<sup>429</sup> it became unnecessary for Scott JA to decide whether it should be 'refined' in this manner because this was not in issue in the papers filed.<sup>430</sup>

This issue next arose for consideration in *Imperial Marine v Deieulemar Compagnia*,<sup>431</sup> where evidence put up by Deieulemar went unchallenged by Imperial Marine and expert evidence presented by Deieulemar undermined 'certain key statements' of Imperial Marine's 'expert witness'.<sup>432</sup> The question arose whether this evidence should be ignored or taken into account.<sup>433</sup>

Judge Wallis referred to Hefer ADCJ's suggestions in *Dabelstein* and whether it was correct for the court to also have regard to those facts in the opposing affidavit which the applicant cannot deny in considering 'whether the applicant has established a *prima facie* case'.<sup>434</sup> This question was posed to Imperial's Counsel who conceded that a court ought to give weight to such evidence, thereby making it unnecessary to decide the approach to be adopted.<sup>435</sup>

Given that such concessions may be unsatisfactory,<sup>436</sup> Wallis JA proceeds to put forward his own reasons in support of Hefer ADCJ's approach, particularly 'where there is no reason to believe that in future proceedings, with the advantages of discovery, those facts are capable of being challenged'.<sup>437</sup> Judge Wallis thinks that the 'primary reason' for adopting this approach is:

'In principle to do otherwise is to shut one's eyes to relevant factual material that may fatally undermine the arresting party's claim and courts do not ordinarily disregard relevant and admissible evidence when reaching their decisions. Disregarding such evidence seems inconsistent with the constitutional requirement that both parties are entitled to a fair hearing confers an unjustifiable advantage on the arresting party.'<sup>438</sup>

<sup>428</sup> *Dabelstein* *supra* note 9 at 1228B.

<sup>429</sup> *Hülse-Reutter* *supra* note 11.

<sup>430</sup> *Ibid* at 1344B.

<sup>431</sup> *Imperial Marine* *supra* note 20.

<sup>432</sup> *Ibid* at 69B.

<sup>433</sup> *Ibid* at 69C.

<sup>434</sup> *Ibid* at 68I-69A.

<sup>435</sup> *Imperial Marine* *supra* note 20 paras 21-22.

<sup>436</sup> *Premier, Limpopo Province v Speaker of the Limpopo Provincial Government and Others* 2011 (6) SA 396 (CC) para 31.

<sup>437</sup> *Imperial Marine* *supra* note 20 at 69E-F.

<sup>438</sup> *Ibid* at 69F.

The above concerns must be understood in the context of Judge Didcott's passage in *Katagum Wholesale Commodities Co Ltd v The MV Paz*,<sup>439</sup> where the learned Judge warned that:

'It is a serious business to attach a ship. To stop or delay its departure from one of our ports, to interrupt its voyage for longer than the period it was due to remain, can have and usually has consequences which are commercially damaging to its owner or charterer, not to mention those who are relying upon its arrival at other ports to load or discharge cargo. Especially when the attachment is sought *ex parte*, as can be and almost always is done, the Court must therefore be given sufficient information to show that a measure with results so harmful to others is nevertheless necessary for the protection of the applicant's legitimate interests.'<sup>440</sup>

Judge Wallis believes that it is out of place for a court to ignore such evidence in deciding whether to uphold an arrest or to sustain it. Nor does Wallis JA believe that this consideration 'offends against any basic principle underpinning the traditional approach to proof' on this basis.<sup>441</sup> But Wallis JA does not agree that the justifications 'for adopting this low-level test in the case of attachments to found jurisdiction' are also applicable to security arrest proceedings.<sup>442</sup>

We have seen that a security arrest is a procedure 'designed to give the arresting party a tangible asset upon which to execute.'<sup>443</sup> However, Wallis JA in *Imperial Marine* also points out that this procedure is 'directed...at obtaining final relief in the form of an order that security be provided for the outcome of proceedings in another forum, usually in another jurisdiction.'<sup>444</sup>

In other words, 'is the requirement of a *prima facie* case' and the approach to determining whether it has been met in the context of security arrests still appropriate in terms of the Act?

According to Judge Van den Heever in *Ecker v Dean*,<sup>445</sup> a claim for security is:

'Not a procedural step in attack or defence at all but a measure of oblique relief sought by one party against the other on grounds foreign to the main issue, ie the financial situation of one litigant, this relief to be effective if at all only after judgment. The order determining this collateral dispute is therefore final and definitive for at no later stage in the proceedings can

<sup>439</sup> *The MV Paz* supra note 101.

<sup>440</sup> Ibid at 269H. These dicta were also quoted approvingly by Corbett CJ in *Bocimar* at 581G-H; and per Scott JA in *MV Snow Crystal* 2008 (4) SA 111 (SCA) para 36.

<sup>441</sup> *Imperial Marine* supra note 20 at 69G-H.

<sup>442</sup> Ibid at 69H-70A.

<sup>443</sup> Hofmeyr op cit note 33 at 177.

<sup>444</sup> *Imperial Marine* supra note 20 at 70A-B.

<sup>445</sup> *Ecker v Dean* 1937 SWA 3 at 4.

the applicant obtain the substance of what has been refused to him. If he has been prejudiced by the order his prejudice is irremediable.<sup>446</sup>

Judge Wallis cites the above passage in the *Imperial Marine* and proceeds to state that it is usually the case that if a security arrest is challenged and the application is not successful; our courts will have no further role to play in such proceedings once security has been put-up.<sup>447</sup> On the basis of s 3(10)(a) of the Act,<sup>448</sup> 'the property' shall then be deemed arrested or attached.<sup>449</sup>

The Judge of Appeal, furthermore, states that these proceedings are 'a special jurisdiction vested in our courts' and that it would not be appropriate for the court to ignore such evidence, particularly where it cannot be contradicted, in determining whether to grant 'an order in terms of s 5(3)(a).'<sup>450</sup> Judge Wallis believes that this is especially the case where the security furnished by the respondent may prove to be decisive 'in decisions concerning the future conduct of the foreign proceedings and even lead to their being abandoned or settled' at the end of the day.<sup>451</sup>

In a similar vein, Malcolm Wallis SC (as he then was) stated in his 2010 textbook<sup>452</sup> that:

'We should not permit our court procedures to work in a manner that facilitates, encourages and rewards dishonesty and untruthfulness in litigation, where deponents feel free to lie on oath in the relatively certain knowledge that their lies will not be tested and exposed and will probably achieve their purpose of defeating a legitimate arrest.'<sup>453</sup>

Thus, there are also policy considerations in favour of reconsidering the approach in the context of security arrests. In light of the above passage and the 'serious consequences,' the Judge should ask 'whether it is fair in the circumstances' if the respondent shipowner were to be ordered to put-up security.<sup>454</sup> This is particularly so where one-ship companies are involved.<sup>455</sup> Reconsideration will also discourage unnecessary litigation and better avoid abuses of process.<sup>456</sup>

<sup>446</sup> *Shepstone & Wylie and Others v Geyser NO 1998 (3) SA 1036 (SCA)* at 1042C-D. See also *Imperial Marine* supra note 20 at 70G.

<sup>447</sup> *Imperial Marine* supra note 20 para 23 footnote 5.

<sup>448</sup> See *MV Alam Tenggiri: Golden Ocean Seabird Maritime Inc and Another v Alam Tenggiri SDN BHD and Another* 2001 (4) SA 1329 (SCA) paras 12-15.

<sup>449</sup> *Imperial Marine* supra note 20 at 70G-H.

<sup>450</sup> *Ibid* at 70B.

<sup>451</sup> *Ibid* at 70B-C.

<sup>452</sup> Wallis op cit note 6.

<sup>453</sup> Wallis op cit note 6 at 120.

<sup>454</sup> See *Longman Distillers* supra note 89 at 914E-G.

<sup>455</sup> Wallis op cit note 6 at 127.

<sup>456</sup> See *Weissglass* supra note 16 at 937C.



Lastly, Wallis JA makes two remarks concerning ‘the approach to proof of a *prima facie* case.’<sup>457</sup> The first is ‘that where the applicant asks the court to draw factual inferences from the evidence, they must be inferences that can reasonably be drawn from it, even if they need not be the only possible inferences from that evidence.’<sup>458</sup> Secondly, Judge Wallis states that inferences drawn ‘from the facts must be based on proven facts and not matters of speculation.’<sup>459</sup>

Therefore, if, as it indeed appears to be the case, the current requirement for a *prima facie* case and the current approach to determining whether it has been met is inappropriate in the context of security arrests – what should the new requirement and approach be for security arrests proceedings? The secondary enquiry becomes whether this requirement and the approach to determining attachments at common-law and under the Act should also now be reconsidered?

## CHAPTER 9 A RECONSIDERATION OF THE *PRIMA FACIE* TEST

### 9.1 Security Arrests

In Admiralty proceedings, the parties before the court in most cases tend to be *peregrini*. This particular occurrence is most common in security arrests launched to obtain security for a claim pending or proceeding abroad.<sup>460</sup> The result is that the apparent purpose behind the procedure for attachment, as stated in *Bradbury Gretorex*,<sup>461</sup> has little bearing in relation to security arrests.<sup>462</sup>

For this reason, the concerns expressed by Hefer ADCJ in *Dabelstein v Lane and Fey*,<sup>463</sup> and (similar considerations to those in *Imperial Marine*<sup>464</sup>) should have been considered by Botha JA in *The MV Thalassini Avgi*.<sup>465</sup> The purpose of a ‘s 5(3) arrest is not to found or confirm jurisdiction,’<sup>466</sup> but ‘the requirement for a *prima facie* case’ was still adopted in this decision.<sup>467</sup>

In contrast, the attachment procedure is considered to be ‘a preliminary step to the institution of an action.’<sup>468</sup> Malcolm Wallis SC (as he then was) described these proceedings as

<sup>457</sup> *Imperial Marine* supra note 20 para 24.

<sup>458</sup> *Ibid* at 70C-D.

<sup>459</sup> *Ibid* at 70D.

<sup>460</sup> Wallis op cit note 6 at 115.

<sup>461</sup> *Bradbury Gretorex* supra note 110 at 532B.

<sup>462</sup> Wallis op cit note 6 at 115.

<sup>463</sup> *Dabelstein* supra note 9 at 1227H-1228A.

<sup>464</sup> *Imperial Marine* supra note 20 paras 21-24.

<sup>465</sup> *Thalassini* supra note 21.

<sup>466</sup> See *Yorigami* supra note 189 at 697E-F; *Thermo Radiant* supra 360 at 306B-307A, 309E-F; *Tigr* supra note 3 at 870B-C.

<sup>467</sup> *MV Thalassini* supra note 21 at 832B-C.

<sup>468</sup> *Weissglass* supra note 16 at 940H.

being 'truly preliminary to the determination of the claim by way of trial.'<sup>469</sup> Therefore, to require the applicant for an arrest *in rem* or attachment to discharge the onus on a burden 'more stringent' than a *prima facie* case 'at this stage of the proceedings is to pre-empt the trial process, with all the safeguards that it contains to ensure that there is a fair adjudication of the claim.'<sup>470</sup>

By comparison, while a consideration of the merits at a later stage justifies the adoption of this 'low-level test' in the realm of attachments at common law, this justification is not 'a pertinent consideration' in a security arrest.<sup>471</sup> This is because a security arrest is a mechanism aimed 'at obtaining final relief in the form of...security for proceedings in another forum.'<sup>472</sup>

Thus, if security arrest proceedings are not a preliminary step and the 'normal safeguards' contained in the trial process are inapplicable – this 'low-level test' needs to be more stringent. This is patent in light of the 'serious consequences' arising from arrest of a ship,<sup>473</sup> the admission of 'untested hearsay evidence'<sup>474</sup> and the additional concerns raised in the *Imperial Marine*.<sup>475</sup>

Nevertheless, in reconsidering 'the test' for security arrests, it is important not to set bar too high, particularly if it will subvert the real intention and purpose behind 'section 5(3) of the Act.' However, there is a currently a patent anomaly that arises in the context of security arrests.

The anomaly to which I refer arose on the recent facts of the *Imperial Marine v Deulemar Compagnia (supra)* case in regard to the engine repairs at Pylos. More particularly, the applicant contended that the engine repairs were necessary because of the supply of defective bunkers, which was the responsibility of the second respondent under the charterparty agreement.<sup>476</sup>

Conversely, the second respondent contended that the repairs were necessitated by the lack of engine maintenance. It is clear that both parties could not be correct given that the reasons given for the engine repairs were mutually exclusive.<sup>477</sup> Yet, in light of the reasons asserted – both parties were found to have a '*prima facie* case' and were both ordered to put-up security.<sup>478</sup>

<sup>469</sup> Wallis op cit note 6 at 115.

<sup>470</sup> Ibid at 115.

<sup>471</sup> *Imperial Marine* supra note 20 at 69H-70A.

<sup>472</sup> Ibid at 70A-B.

<sup>473</sup> *The MV Paz* supra note 101 at 269H.

<sup>474</sup> *Knox D'Arcy* supra note 418 at 379-G.

<sup>475</sup> *Imperial Marine* supra note 20 paras 21-23.

<sup>476</sup> See *Imperial Marine Company* unreported judgment of Baartman J in the Western Cape High Court, Cape Town, AC8/2009 and AC20/09, judgment delivered on Monday 02 August 2010.

<sup>477</sup> Ibid para 9.

<sup>478</sup> *Imperial Marine* supra note 20 paras 1-3.

It is submitted that this outcome in itself justifies a reconsideration of the 'current test' in this context. Moreover, the approach I suggest will avoid future anomalies such as both parties proving a *prima facie* case and then both sides having to put up security, which is onerous. To this end, I propose that the correct approach in the case of security arrests should be akin to the requirement for a *prima facie* case 'in the context of an application for a temporary interdict.'

The new requirement that an applicant should now prove for a security arrest is as follows:

'That the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt.'<sup>479</sup>

The assessment of evidence should be the same as that in *Gool v Minister of Justice*.<sup>480</sup>

'Where the applicant cannot show a clear right, and more particularly where there are disputes of fact, the Court's approach in determining whether the applicant's right is *prima facie* established, though open to some doubt, is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial of the main action.'<sup>481</sup>

Thus, it was stated in *Simon NO v Air Operations of Europe AB and Others* that:<sup>482</sup>

'The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed (*Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688B-F & the numerous cases that have followed it).'<sup>483</sup>

The main justification for adopting this requirement and approach in the context of security arrests is that a temporary interdict, like an attachment, 'interferes with an apparent right' but will also take account of the 'possible injury to either side.'<sup>484</sup> The further justification for adopting this 'new test' is that it considers whether the applicant would, based on the 'disputed facts, obtain final relief at the trial of the main action.' This is important because such proceedings do not contain the safeguards of the trial process and the order is final in its relief.<sup>485</sup>

<sup>479</sup> *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 687-8; *Pietermaritzburg City Council v Local Road Transportation Board* 1959 (2) SA 758 (N) at 772. In *Simon NO v Air Operations Europe AB and Others*, Smalberger JA stated in this regard that an applicant for a temporary interdict must establish 'a *prima facie* right, even though open to some doubt (*Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189).'

<sup>480</sup> 1955 (2) SA 682 (C).

<sup>481</sup> *L.F. Boshoff Investments v Cape Town Municipality* 1969 (2) SA 256 (C) at 267E-F.

<sup>482</sup> *Simon* supra note 375.

<sup>483</sup> *Simon* supra note 375 at 228H.

<sup>484</sup> *Bradbury Gretorex* supra note 110 at 531G.

<sup>485</sup> See Wallis op cit note 469 at 115. See also *Imperial Marine* supra note 20 para 23.

In most cases, 'security arrests are brought *ex parte*' and many of the allegations are 'hearsay in nature.'<sup>486</sup> A security arrest is aimed at providing the claimant with 'a tangible asset against which to execute' while the owner must 'put-up security to the value of the property.'<sup>487</sup> Given these serious consequences, the 'test' should aim to better protect such injured parties.<sup>488</sup>

It may be argued that in calling for a 'more stringent test' to be employed, why not then adopt the approach laid down in *The MV Paz* (*supra*). The short answer is that this requirement was not favoured by Botha JA in the Appellate Division case of *The MV Thalassini Avgi*.<sup>489</sup> However, in opting against the approach of *The MV Paz*, the concerns of the nature expressed by Hefer ADCJ in *Dabelstein* should have been considered by Botha JA in the *MV Thalassini Avgi*.

In *van Woudeberg v Roos*,<sup>490</sup> a case concerning a temporary interdict, Malan J stated that:

'In my view, it is sufficient for an applicant in interdict proceedings *pendente lite* to satisfy the Court that he has a reasonable prospect of success in the main action although there is no definite preponderance of probabilities in his favour. Such a view appears to be in accord with the language of INNES, J.A., in *Setlogelo's* case...The more stringent rule may lead to injustice and hardship.'

In *Alison v Mears*,<sup>491</sup> Ramsbottom J criticized this statement of the law in pointing out that 'when the words *prima facie* case are used in respect of an interdict pending action more than a reasonable possibility of success at the trial is meant.'<sup>492</sup> Nevertheless, Clayden J in *Webster v Mitchell*<sup>493</sup> held: 'I do not think it necessary to decide whether the test of a "reasonable prospect of success" applied by MALAN, J., is a proper paraphrase of the words of INNES, J.A.'<sup>494</sup> Moreover, 'the reasonable prospect of success' test has not since found favour with our courts.<sup>495</sup>

Therefore, it is submitted that the temporary interdict approach and requirement is more appropriate than the current 'low-level test' for a *prima facie* case.<sup>496</sup> It will avoid the concerns

<sup>486</sup> The Admiralty Jurisdiction Regulation Act, s 6(3).

<sup>487</sup> Hofmeyr op cit note 33 at 174-177.

<sup>488</sup> Hare op cit note 35 at 117.

<sup>489</sup> See *The MV Thalassini* supra note 21 at 831F-H.

<sup>490</sup> 1946 TPD 110.

<sup>491</sup> 1946, W.L.D. 265.

<sup>492</sup> Ibid at 265.

<sup>493</sup> *Webster* supra note 145.

<sup>494</sup> Ibid at 1189.

<sup>495</sup> Besides *The MV Paz* where it was applied in the context of security arrests, it has since only been referred to in *SA Motor Racing Co Ltd And Others v Peri-Urban Areas Health Board And Another* 1955 (1) TPD 334.

<sup>496</sup> *Imperial Marine* supra note 20 at 69G-H.

and consequences adverted to by Didcott J in *The MV Paz* and better address the concerns of Wallis JA in the *Imperial Marine*. It will also consider the 'possible injury' to the shipowner.<sup>497</sup>

At the end of the day, security arrests may be decisive in the 'future conduct of the foreign proceedings' and may 'even lead to them being abandoned or settled.'<sup>498</sup> For this reason, a more stringent test is needed but also one that will avoid the anomaly that arose on the facts of the *Imperial Marine* case. Clearly, the justification for the current 'test' in the context of security arrests is no longer apposite or satisfactory.<sup>499</sup> The procedure is also drastic because the order is for final relief, the security is obtained for proceedings elsewhere and it contains none of the safeguards of the trial process. The requirement for a *prima facie* case in temporary interdict applications is more stringent and the approach will better assess 'materially relevant evidence.'

## 9.2 Common-Law Attachments

It will be recalled that Hefer ADCJ in *Dabelstein v Lane and Fey NNO*,<sup>500</sup> recommended that:

'The time may come to reconsider the approach adopted in the past and to have regard also, in the assessment of the evidence, to the allegations in the respondent's answering affidavit which the applicant cannot contradict.'<sup>501</sup>

From the analysis, it has been shown that the concerns of Hefer ADCJ in the *Dabelstein* case were well founded in the context of security arrests. Insofar as attachments at common law are concerned, I submit that the current approach should be altered to accord with the suggestion in *Dabelstein v Lane and Fey* but that the current requirement does not merit reconsideration.<sup>502</sup>

The premise underlying all common-law cases dealing with attachments<sup>503</sup> was to assist *incolae* plaintiffs to sue *peregrini* defendants. This principle has not changed at common law.<sup>504</sup> In other words, it remains a mechanism designed 'to enable an *incola* to pursue its claim against a *peregrinus* as if the *peregrinus* were otherwise subject to the jurisdiction of the court.'<sup>505</sup>

<sup>497</sup> *Bradbury Gretorex* supra note 110 at 531G.

<sup>498</sup> *Imperial Marine* supra note 20 at 70B-C.

<sup>499</sup> *Ibid* at 70B.

<sup>500</sup> *Dabelstein* supra note 9.

<sup>501</sup> *Hülse-Reutter* supra note 11 at 1344A-B.

<sup>502</sup> *Dabelstein* supra note 9 at 1227I-1228B.

<sup>503</sup> *Ex parte Acrow Engineers (Pty) Ltd* 1953 (2) SA 319 (T); *Bradbury Gretorex Co Ltd v Standard Trading Co Ltd* 1953 (3) SA 529 (W); *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A); *Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd* 1990 (2) SA 906 (A).

<sup>504</sup> *Herbstein & Van Winsen* op cit note 349 at 98. See *Longman Distillers* supra note 89 at 912D-E.

<sup>505</sup> *Bradbury Gretorex* supra note 110 at 532B.

After all, if an attachment is ‘a preliminary step to the institution of an action,’<sup>506</sup> and its primary function ‘is to establish jurisdiction’ then once jurisdiction is found (or confirmed); ‘the cause of action will in due course have to be established in accordance with the ordinary standard of proof [i.e. on the normal balance of probabilities] in subsequent proceedings.’<sup>507</sup>

Certainly, the ‘fact that the merits will be considered at a later stage’ still justifies the adoption of this ‘low-level test’ in the realm of common-law attachments.<sup>508</sup> For, even if the doctrine of effectiveness is being ‘eroded’ by our courts by permitting the attachment of property ‘whose value bears no realistic relationship to the amount of the claim advanced in the proposed litigation;’ this does not entail that this requirement also needs reconsidering at common law.<sup>509</sup>

This is because ‘where both the plaintiff and defendant are foreign *peregrini*,’<sup>510</sup> there still needs to be a recognised *ratio jurisdictionis* and attachment of the defendant’s property to establish jurisdiction.<sup>511</sup> This is in contrast to the position in Admiralty matters under the Act.<sup>512</sup> The Act has extended ‘the scope of common-law attachments to found jurisdiction to admiralty matters (even though a *peregrinus* may be the applicant).’<sup>513</sup> This extension was necessary in the context of Admiralty practice where the parties are mostly *peregrini* and hearsay evidence is permitted.<sup>514</sup> However, the Act has not undermined the common-law principles for attachments.

Moreover, if you do reconsider the current requirement in this context – it would then have the effect of subverting ‘the entire purpose of the jurisdiction if the applicant had to establish the merits of the claim at the stage of the [attachment].’<sup>515</sup> This would involve doing so in circumstances where the procedure is a preliminary step and there is no decision on the merits.<sup>516</sup>

Therefore, the approach at common law should now be that stated in *Dabelstein (supra)*:

<sup>506</sup> *Weissglass* supra note 16 at 940G-H.

<sup>507</sup> *Hülse-Reutter* supra note 11 para 12.

<sup>508</sup> *Imperial Marine* supra note 20 at 69H.

<sup>509</sup> *Thermo Radiant* supra note 360 at 300G-H.

<sup>510</sup> In *Siemens* supra note 353, Hoexter JA stated at 917C-D that: ‘A litigant neither domiciled nor resident in one Division of the Supreme Court who is nevertheless domiciled or resident in another such Division is sometimes described as a “local *peregrinus*” of the former Division. On the other hand a litigant who is neither domiciled nor resident in any Division of our Supreme Court is described as a “foreign *peregrinus*.”’

<sup>511</sup> *Siemens* supra note 353 at 928F-G.

<sup>512</sup> See Admiralty Jurisdiction Regulation Act, s 3(2) read with s 4(4).

<sup>513</sup> *Weissglass* supra note 16 at 937E.

<sup>514</sup> Wallis op cit note 6 at 115-127.

<sup>515</sup> Ibid at 111.

<sup>516</sup> *Weissglass* supra note 16 at 940G-H.

‘Those allegations in a respondent’s opposing affidavit which the applicant cannot contradict must weigh in the assessment of the evidence.’<sup>517</sup>

This would have been the finding in *Dabelstein* and *Hülse-Reutter* had this question on the facts necessitated an answer and if Counsel had not made this concession in the *Imperial Marine*.

In practice, this approach has already been followed at provincial division level by the South Gauteng High Court in the case *Anish Anil Maharaj v Dinesh Choudree & Two Others*.<sup>518</sup>

In paragraph 4 of the South Gauteng High Court judgment, Van Oosten J states that:

‘In deciding whether the applicant has made out a *prima facie* case, I propose to adopt a two-legged approach, firstly to consider the allegations concerning the applicant’s cause of action as set out in the founding papers and secondly, (in line with the approach proposed in *Dabelstein and Others v Lane and Fey NNO*, supra) to also have regard to what has been said in the respondent’s answering affidavit, or to put it differently, to look at all the evidence before me in order to decide whether a *prima facie* cause of action has been established.’<sup>519</sup>

In referring to the remedy of attachment and in stating that it should be applied with care and caution given its ‘exceptional nature and far-reaching consequences for the owner of the property attached,’ Judge Van Oosten held ‘this is even more apposite in our post constitutional dispensation where the protection is constitutionally (s 15(1) of the Constitution) enshrined.’<sup>520</sup>

### 9.3 Attachments under the Act

It was stated in the introduction that if the current approach were to be reconsidered, the ‘altered approach’ would be followed in both instances of attachments at common law and under the Act. However, I shall submit that the current requirement and approach, particularly in the context of attachments under the Act, should also be reconsidered in light of the following considerations.

The starting point is that prior to its enactment, our courts were trying to make it easier for local *incolae* to sue foreign *peregrini* but this consideration has now changed. Our courts, in the operation of their admiralty jurisdiction, are now presiding over disputes where the parties to the proceedings are mostly *peregrini*,<sup>521</sup> where the cause of action arose outside the jurisdiction.<sup>522</sup>

<sup>517</sup> *Dabelstein* supra note 9 at 1227I-1228B.

<sup>518</sup> Unreported in the South Gauteng High Court (Johannesburg), Case No 09/52967, delivered on 01 March 2010.

<sup>519</sup> Ibid para 4.

<sup>520</sup> Ibid paragraph 3. See too the ‘fairness argument’ in *Tsung* supra note 357 para 13.

<sup>521</sup> Wallis op cit note 6 at 115.

<sup>522</sup> Hofmeyr op cit note 33 at 189. See *Shipping Corporation* supra note 379 at 562C-H; *The Snow Delta* supra note 387 at 750D-E.

The introduction of the Act has also meant that the circumstances under which an attachment can be instituted are now vastly different to those before its enactment. Hofmeyr has observed that 'in practice actions *in personam* were seldom brought before the commencement of the Act.'<sup>523</sup> The Act has thus changed the philosophy underlying attachments at common law.

In consequence, the remedy of an attachment under the Act no longer appears to be 'intended primarily for the benefit of the *incola*.'<sup>524</sup> It can therefore be said that the conclusion reached in *Bradbury Gretorex* regarding the difference between attachments and temporary interdicts and Steyn's justifications in favour of the former are no longer apposite under the Act.

This outcome is the direct result of section 3(2)(b) read with s 4(4)(a) of the 1983 Act.

Thus, 'Corbett CJ in *Shipping Corporation of India v Evdomon Corporation*' stated that:<sup>525</sup>

'The attachment procedure provided for by s 3(2)(b) of the Act in the case of actions *in personam* is obviously derived from our common law, which in general, unlike English law, allowed a *peregrine* defendant in a personal action to be sued and process served by edictal citation, provided that property of the defendant was attached to found or confirm jurisdiction (*T W Beckett & Co Ltd v H Kroomer Ltd* 1912 AD 324 at 336).'<sup>526</sup>

Chief Justice Corbett (as he then was) then proceeded to state, in passing, that:

'In conferring jurisdiction on the Court by attachment of property in an action *in personam* where both parties are *peregrini* and where the cause of action has no connection with this country, s 3(2)(b) goes well beyond the jurisdictional grounds recognised at common law.'<sup>527</sup>

Accordingly, Hofmeyr concludes 'that an action *in personam* may be instituted by a *peregrine* plaintiff against a *peregrine* defendant whose property has been attached within the jurisdiction even where the cause of action arose outside the jurisdiction.'<sup>528</sup> The general requirement that 'the property in question must be within the court's jurisdiction'<sup>529</sup> is also subject to exceptions under the Act.<sup>530</sup> Moreover, there is a 'general principle' that 'once

<sup>523</sup> Hofmeyr op cit note 33 at 184.

<sup>524</sup> *Bradbury Gretorex* supra note 110 at 532E.

<sup>525</sup> *Shipping Corporation* supra note 379.

<sup>526</sup> Ibid at 562C-D.

<sup>527</sup> Ibid at 562E-H.

<sup>528</sup> Hofmeyr op cit note 33 at 189.

<sup>529</sup> Admiralty Jurisdiction Regulation Act, s 3(2)(b).

<sup>530</sup> Hofmeyr op cit note 33 at 189. See Admiralty Jurisdiction Regulation Act, ss 4(4)(b) and 4(4)(c)(i).



jurisdiction is established, it continues' to subsist until completion of the action.<sup>531</sup> The fact that the property may become *valueless*<sup>532</sup> or even *cease to exist*<sup>533</sup> will not affect this jurisdiction.<sup>534</sup>

In addition, the value of the security is a 'pertinent consideration in the context of the Act' in comparison to the position at common law.<sup>535</sup> Under the Act, the property is attached to obtain security for the applicant's claim.<sup>536</sup> In terms of Admiralty Rule 5(4),<sup>537</sup> the shipowner will only be able to arrange its release from attachment by putting-up security for the entire claim.<sup>538</sup> However, it is onerous to put-up security particularly where it transpires that the attachment was not 'fair' in the circumstances, was an 'abuse of process' or excessive security was demanded.<sup>539</sup>

Based on these considerations, perhaps the time has come to reconsider the current requirement and approach to attachments under the Act, particularly where both parties are foreign *peregrini*. While the 'fact that the merits will be heard in later proceedings' is stated as a justification for this 'low-level test',<sup>540</sup> there are now instances where our courts are directing setting-aside applications to oral evidence<sup>541</sup> if material disputes of fact or peculiar circumstances are present.<sup>542</sup> Furthermore, our courts are also slow to 'order a *peregrinus* to contest an action before it in order to determine whether the court has jurisdiction against that *peregrinus*.'<sup>543</sup>

It is therefore submitted that the 'altered approach' should be followed when dealing with an attachment under the Act launched by an *incola* plaintiff against a *peregrine* defendant, while if both parties are foreign *peregrini* – the courts should follow the 'test' applied in temporary interdict applications.<sup>544</sup> If 'it is a serious business to attach a ship' and the attachment is brought on an *ex parte* basis; the 'current test' should be more stringent in relation to foreign *peregrini*.<sup>545</sup>

## CHAPTER 10 CONCLUSION

<sup>531</sup> Ibid at 189.

<sup>532</sup> *MT Tigr* supra note 3 at 871H-I.

<sup>533</sup> Hofmeyr op cit note 33 at 189.

<sup>534</sup> *MT Tigr* supra note 3 at 871H-I. See also *Thermo Radiant* supra note 360 at 301E-F; 310D-F.

<sup>535</sup> Hofmeyr op cit note 33 at 177.

<sup>536</sup> Ibid at 174.

<sup>537</sup> Admiralty Proceedings Rule 5(4).

<sup>538</sup> Wallis op cit note 6 at 348.

<sup>539</sup> See *Weissglass* supra note 16 at 937C.

<sup>540</sup> *Imperial Marine* supra note 20.

<sup>541</sup> In terms of section 4 of the Admiralty Jurisdiction Regulation Act read with Uniform Rule of Court 6(5)(g).

<sup>542</sup> See *The Kadirga 5* SCOSA C12 (N); *The Leros Strength* SCOSA C20 (D); *MV Alina II: Kumba Shipping Hong Kong Limited v Prima Shipping Co Limited and Another* (WCC) unreported case no AC47/2010 (26 July 2011).

<sup>543</sup> *Zygos Corporation v Salen Rederierna AB* 1985 (2) SA 486 (C) at 497F.

<sup>544</sup> See *Gool* supra note 480.

<sup>545</sup> See *Imperial Marine* supra note 20.

This dissertation has examined the requirement of 'a *prima facie* case and the approach to determining whether it has been met' in the context of security arrests. In doing so, it has shown that the *prima facie* requirement and the approach to security arrests should now be akin to that applied in relation to temporary interdict applications, particularly where factual disputes arise.

The secondary enquiry has looked at the requirement of 'a *prima facie* case and the approach in the context of' common-law attachments to evaluate whether it needs reconsidering. It is submitted that the 'altered approach' of Hefer ADCJ in *Dabelstein* above should be adopted.

Lastly, it was submitted 'that the requirement of a *prima facie* case' and the approach to determining whether it has been met in the context of attachments under the Act may merit reconsideration in light of the enactment of the Act. From an analysis of the Act, it is the view of the writer that the 'altered approach' should be applied in relation to *incolae* plaintiffs but if both parties are foreign *peregrini* – the 'test' applied for temporary interdicts should be then followed.

## BIBLIOGRAPHY

### Cases

*Alison v Mears* 1946 W.L.D. 265

*Anderson and Coltman Ltd v Universal Trading Co* 1948 (1) SA 1277 (W)

*Anish Anil Maharaj v Dinesh Choudree and Two Others* unreported judgment of Van Oosten J in the South Gauteng High Court, Johannesburg, Case No 09/52967, delivered on 01 March 2010.

*Bocimar NV v The Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A).

*Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd* 1953 (3) SA 529 (W)

*Butler v Banimar Shipping Co SA* 1978 (4) SA 753 (SE)

*Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A)

*Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A)

*Cochran v Miller* 1965 (1) SA 162 (D)

*Continental Illinois National Bank and Trust Co of Chicago v Greek Seamen's Pension Fund* 1989 (2) SA 515 (D)

*Dabelstein v Lane and Fey NNO* 2001 (1) SA 1222 (SCA)

*Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C)

*Dole Fresh Fruit International Ltd v MV Kapetan Leonidas* 1995 (3) SA 112 (A)

*Ecker v Dean* 1937 SWA 3

*Ewing v McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A)

*Ex parte Acrow Engineers (Pty) Ltd* 1953 (2) SA 319 (T)

*Ex Parte Strip Mining (Pty) Ltd : In re Natal Coal Exploration Co Ltd (In Liquidation) (Kangra Group Pty Ltd and Another Intervening)* 1999 (1) SA 1086 (SCA)

*Gool v Minister of Justice and Another* 1955 (2) SA 682 (C)

*Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA)

*Govan v Skidmore* 1952 (1) SA 732 (N)

*Great River Shipping Inc v Sunnyface Marine Ltd* 1994 (1) SA 65 (C)

*Hasselbacher Papier Import and Export (Body Corporate) v MV Stavroula* 1987 (1) SA 75 (C)

*Hülse-Reutter v Gödde* 2001 (4) SA 1336 (SCA)

*Imperial Marine Co v Deieulemar Compagnia Di Navigazione Spa* 2012 (1) SA 58 (SCA)

*Imperial Marine Co v Deuilemar* unreported judgment of Baartman J in the Western Cape High Court, Cape Town, AC8/2009 and AC20/09, judgment delivered on Monday 02 August 2010.

*Italtrafo SpA v Electricity Supply Commission* 1978 (2) SA 705 (W)

*Kasimov v Kurland* 1987 (4) SA 76 (C)

*Katagum Wholesale Commodities Co Ltd v The MV Paz* 1984 (3) SA 261 (N)

*Knox D'Arcy Ltd and Others v Jamieson and Others* 1994 (3) SA 700 (W)

*Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A)

*Lecomte v W. and B. Syndicate of Madagascar*, 1905 T.S. 696

*Lendlease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola and Others* 1976 (4) SA 464 (A)

*LF Boshoff Investments v Cape Town Municipality* 1969 (2) SA 256 (C)

*Lindhaven Meat Market CC v Reynecke* 2001 (1) SA 454 (W)

*Lippert v de Marillac*, 11 S.C. 312 at p.136.

*Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd* 1990 (2) SA 906 (A)

*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A)

*Mazibuko v Santam Insurance Co Ltd* 1982 (3) SA 125 (A)

*MFV Logan Ora: R D Summers Fisheries CC v Viking Fishing Co (Pty) Ltd* 1999 (4) SA 1081 (SE)

*Miller v Minister of Pensions* [1947] 2 All ER 372

*MSC Gina Mediterranean Shipping Co SA v Cape Town Iron and Steel Works* 2011 (2) SA 547 (KZD)

*MV Alina II: Kumba Shipping Hong Kong Ltd v Prima Shipping Co Ltd and Another* (WCC) unreported case number AC47/2010 [related to case number AC108/09] (26 July 2011)

*MT Argun* 2001 (3) SA 1230 (SCA)

*MT Tigr : Owners of the MT Tigr and Another v Transnet Ltd t/a Portnet (Bouygues Offshore SA and Another Intervening)* 1998 (3) SA 861 (SCA)

*MV Alam Tenggara: Golden Seabird Maritime Inc and Another v Alam Tenggara SDN BHD and Another* 2001 (4) SA 1329 (SCA)

*MV Snow Crystal* 2008 (4) SA 111 (SCA)

*My Summit One: Farocean Marine (Pty) Ltd v Malacca Holdings Ltd* 2003 (6) SA 94 (C)

*MY Summit One: Farocean Marine (Pty) Ltd v Malacca Holdings Ltd and Another* 2005 (1) SA 428 (SCA)

*MV Orient Stride: Asiatic Shipping Services Inc v Elgina Marine Co Ltd* 2009 (1) SA 246 (SCA)

*MV Wisdom C* 2008 (1) SA 665 (C)

*MV Wisdom C: United Enterprises Corporation v STX Pan Ocean Co Ltd* 2008 (3) SA 585 (SCA)

*Naylor v Jansen; Jansen v Naylor* [2005] 4 All SA 26 (SCA)

*New Zealand Construction (Pty) Ltd v Carpet Craft* 1976 (1) SA 345 (N)

*Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (SCA)

*Peregrine Group (Pty) Ltd v Peregrine Holdings Ltd* 2001 (3) SA 1268 (SCA)

*Pietermaritzburg City Council v Local Road Transportation Board* 1959 (2) SA 758 (N)

*Premier, Limpopo Province v Speaker of the Limpopo Provincial Government and Others* 2011 (6) SA 396 (CC)

*Rosenberg and Another v Mbanga and Others (Azaminle Liquor (Pty) Ltd Intervening)* 1992 (4) SA 331 (E)

*SA Marine Corporation SA v MV 'Maritime Valour' and Another*, Case No 03/2003 (Durban), SCOSA B293

*SA Motor Racing Co Ltd And Others v Peri-Urban Areas Health Board And Another* 1955 (1) TPD 334.

*Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA)

*Shipping Corporation of India v Evdomon Corporation* 1994 (1) SA 550 (A)

*Siemens Ltd v Offshore Marine Engineering Ltd* 1993 (3) SA 913 (A)

*Simon NO v Air Operations of Europe AB* 1999 (1) SA 217 (SCA)

*Springle v Mercantile Association of Swaziland* 1904 T.S. 163

*Sunnyface Marine Ltd v Hitoroy Ltd (Trans Orient Steel Ltd and Another Intervening); Sunnyface Marine Ltd v Great River Shipping Inc* 1992 (2) SA 653 (C)

*SY Sandokan: Owner of the SY Sandokan v Liverpool and London Steamship Protection and Indemnity Association Ltd* 2001 (3) SA 824 (D)

*The Ever Growth: Green Africa Shipping (Pty) Ltd v HIFU Electronic Trading CC* 2003 SCOSA B251 (D)

*The Kadirga 5* SCOSA C12 (N)

*The Leros Strength* SCOSA C20 (D)

*The Owners, Master and Crew of the SS Humber v Owners and Master of the SS Answald* 1912 AD 546

*The Maritime Valour: SA Marine Corporation SA v Valour Navigation Company Ltd* 2003 (SCOSA) B293 (D)

*The MFV Logan Ora: R D Summers Fisheries CC v Viking Fishing Co (Pty) Ltd* 1999 (4) SA 1081 (SE)

*The Rizcun Trader* (4) 2000 (3) SA 776 (C)

*The Snow Delta* 2000 (4) SA 746 (SCA)

*The Sylvia: Progress Bulk Carriers Ltd v Silvia Shipping Co Ltd and Another* 2008 (5) SA 562 (N)

*The MV Zlatni Piasatzi: Frozen Foods International Ltd v Kudu Holdings (Pty) Ltd and Others* 1997 (2) SA 569 (C)

*Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A)

*Tick v Broude and Another* 1973 (1) SA 462 (T)

*Transgroup Shipping SA (Pty) Ltd v Owners of MV Kyoju Maru* 1984 (4) SA 210 (D)

*Transol Bunker BV v MV Andrico Unity; Grecian MAR SRL v MV Andrico Unity* 1987 (3) SA 794 (C)

*Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA)

*Union Government (Minister of Railways) v Sykes* 1913 AD 165

*Van Woudeberg v Roos* 1946 TPD 110.

*Venter v Credit Guarantee Insurance Corporation* 1996 (3) SA 966 (A)

*Webster v Mitchell* 1948 (1) SA 1186 (W)

*Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A)

*Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C)

*Zygos Corporation v Salen Rederierna AB* 1985 (2) SA 486 (C)

### Legal Jurists

Huber, *Hedendaegse Rechtgeleertheit*, 4.31.3.

Peckius, *Handopleggen* Ch 36.

Sande, *Decisiones* 1.17.3

*Voet* 2.4.22; 5.1.66

Vromans, *De Foro Competenti* 1, 15 n. 34.

### Statutes

Admiralty Proceedings Rules Regulating the Conduct of the Admiralty Proceedings of the Several Provincial and local divisions of the Supreme Court of South Africa with effect from 19 May 1997.

The Admiralty Jurisdiction Regulation Act 105 of 1983

The Law of Evidence Amendment Act 45 of 1988

Uniform Rules of Court

### Textbooks

J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2ed Juta & Co Ltd (2009).

G Hofmeyr SC *Admiralty Jurisdiction: Law and Practice in South Africa* 2ed Juta & Co Ltd, Cape Town (2012) Chapters IV, V & VI.

GB Bradfield *Law of South Africa* Vol 25(2) 2<sup>nd</sup> ed (2012) paras 1-9.

Herbstein and Van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5ed by AC Cilliers, C Loots and HC Nel, Juta and Co Ltd 2009.

Stephen Pete et al *Civil Procedure: A Practical Guide* 2ed Oxford University Press (2011) pp112-114.

PJ Schwikkard and S van der Merwe *Principles of Evidence* 3ed Juta & Co Ltd (2009) Ch 32.

MJD Wallis SC *The Associated Ship & South African Admiralty Jurisdiction* Siber Ink CC Cape Town (2010) Chapter 5.